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Supreme Court, U.S.
FILED

No. 08-_____08-163

AUG 7- 2008

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In The
Supreme Court of the United States

GEORGIA MCCANN,

Petitioner,

v.

SAM COCHRAN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a prima facie case of intentional discrimination require a judicial finding that the defendant gave more favorable treatment to a "nearly identical" comparator?

PARTIES

The petitioner is Georgia McCann.

The respondents are (1) Sam Cochran, who is sued in his official capacity as the Sheriff of Mobile County, Alabama,* (2) Michael Haley, David Turner and Melinda Bounds, each sued in his or her official and personal capacity, (3) the Mobile County Personnel Board.

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* At the time this action was commenced, the Sheriff of Mobile County was Jack Tillman. Mr. Tillman has since been replaced as Sheriff by Sam Cochran. Pursuant to Rule 25(d)(1), Fed.R.Civ.Pro., Cochran is substituted for Tillman.

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Petitioner Georgia McCann respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on May 9, 2008.

OPINIONS BELOW

The May 9, 2008 opinion of the court of appeals, is reported at 526 F.3d 1370 (11th Cir.2008), and is set out at pp. 1a-21a of the Appendix. The July 6, 2006 order of the district court, which is unofficially reported at 2006 WL 1867486 (S.D.Ala.2006), is set out at pp. 22a-74a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on May 9, 2008. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved are set forth in the Appendix.

STATEMENT OF THE CASE

This case concerns the Eleventh Circuit's "nearly identical" rule for resolving claims of intentional discrimination. Plaintiff McCann alleged that she had been the victim of racial discrimination in employment, and adduced evidence that her boss – the

Sheriff of Mobile County – had openly referred to blacks as "niggers." The court of appeals nonetheless dismissed McCann's claim, holding that she had failed even to establish a prima facie case – regardless of the sheriff's racist remarks – because the white employees who had been treated more favorably than McCann were not "nearly identical" to her.

Petitioner McCann is a black correctional officer for the Mobile County Sheriff's Office. In 2004, when the events at issue occurred, the County Sheriff was Jack Tillman. On the morning of June 1, 2004, when McCann was already in uniform and on her way to work, she learned that her son had been taken into custody in neighboring Washington County. McCann called her office and asked for an emergency vacation day so that she could assist her son; she was told, instead, to report to work as soon as she returned from Washington County. (App. 2a, 27a; see R 40-95, pp. 231-33).

When she reached Washington County, McCann discovered that, after her son had been arrested and placed in a Deputy's car, the Deputy then used the car to engage in a high speed chase of another, unrelated, individual; during that pursuit the son suffered a head injury that later required treatment at a local emergency room. McCann also learned that a number

of personal items had been taken from her son's car after he was in custody.[1]

McCann disapproved of the manner in which Washington County deputies had handled her son, and she expressed that view to the Washington County Sheriff, commenting, sarcastically, "this is just Washington County." After arranging for her son to be released on bond, McCann took him to the hospital. The incident and subsequent medical treatment consumed the rest of the work day, and McCann did not go to work that day.[2]

Based on these events, Sheriff Tillman suspended McCann for 15 days without pay.[3] Tillman asserted that McCann was guilty of several infractions, including violating a directive that permitted officers to wear uniforms only when they were on the job or going to and from work. (App. 2a, 26a, 27a). McCann was apparently the only officer who had ever been disciplined for violating that directive; there were disputes as to whether the policy regarding uniforms had actually been violated and whether that policy had been made known to employees. (App. 2a-3a, 7a n.4, 28a). The suspension was upheld by the Mobile County Personnel Board.

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[1] R 40-95, pp. 93-98, 235-39.

[2] R 40-95, pp. 20, 21, 46, 220.

[3] Tillman suspended 5 days of that suspension pending six months of good behavior. The Personnel Board imposed a full 15 day suspension without that good behavior provision. (App. 3a).

The day after McCann's suspension began, McCann's supervisor adopted a new rule that barred anyone who had been suspended from thereafter receiving overtime for a period of 90 days. That new rule significantly reduced the amount that McCann was able to earn after her suspension had ended. (App. 3a, 13a, 36a-37a). A month after the suspension, McCann for the first time in her career received an unfavorable job evaluation, which was expressly based on her disciplinary suspension. That unfavorable rating in turn precluded McCann from obtaining a promotion to Corporal, despite being near the top of the Corporal promotion list. (App. 3a, 14a, 41a-43a).

McCann filed suit in federal court, alleging inter alia that her suspension (and, thus, the ensuing loss of overtime and promotion) were the result of racial discrimination.[4] In support of that claim, McCann proffered several types of evidence. Sheriff Tillman had assertedly referred to one female employee as a "nigger bitch," and announced that he had never received the "nigger vote" and did not want it. (App. 19a, 70a). McCann's white supervisor, the Sheriff's cousin, had referred to McCann (despite McCann's objection) as "girl," and had referred to several black male officers as "boys." (App. 19a, 70a).

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[4] The complaint alleged that the discrimination violated Title VII and 42 U.S.C. §1981, and set out a claim under 42 U.S.C. §1983 for racial discrimination that violated the Equal Protection Clause of the Fourteenth Amendment.

McCann offered as well evidence that two white officers had been treated more favorably than she had in the disciplinary process. In the summer of 2004 a white supervisor had pled guilty to two criminal charges, disorderly conduct and resisting arrest. That official was not disciplined at all. A second white officer had been found guilty of conduct unbecoming an officer (the same characterization used by Tillman regarding McCann's conduct) for verbally abusing a nurse while in uniform and on duty; that officer received only a written reprimand and no suspension. (App. 8a-9a, 30a-32a).

The district court granted summary judgment in favor of the defendant. The court held that under Eleventh Circuit precedent a plaintiff cannot establish a prima facie case unless she can identify a comparator who was treated more favorably despite circumstances that are "nearly identical" to those of the plaintiff. (App. 29a-30a, 32a). The district court stressed that the Eleventh Circuit "nearly identical" standard "is stringent." (App. 32a). Finding that the two white officers described above were not "nearly identical" to McCann, the district court concluded that McCann had failed even to establish a prima facie case and granted summary judgment. (App. 34a).

The court of appeals also applied the "nearly identical" standard, explaining that it was "bound by precedent to adhere to the 'nearly identical standard.'" (App. 7a n.4). Eleventh Circuit precedent required, as an essential element of a prima facie

case, that a plaintiff prove that "her employer treated similarly situated [white] employees more favorably." (App. 6a). In order to show the existence of a legally sufficient comparator, "the quantity and quality of the comparator's misconduct [must] be nearly identical." (App. 6a) (*quoting Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir.1999)).

In light of the fact that the particular circumstances for which McCann had been disciplined were unique, the panel acknowledged "the difficulty McCann may face in meeting this standard." (App. 7a n.4). The court of appeals nonetheless applied that stringent standard, finding that the whites treated more favorably than McCann were not "proper comparators" because their infractions were not "nearly identical" to the misconduct with which McCann was charged. Although McCann had argued the two white employees in question had engaged in misconduct that was more serious than what she was accused of, the court of appeals did not address that contention, which simply is not relevant under the "nearly identical" standard.

In the absence of a proper comparator, the panel held, McCann

> failed to establish a prima facie case of discrimination with respect to her suspension, and the burden will not be shifted to the appellees to provide a legitimate, nondiscriminatory reason for their actions.

(App. 10a). Since McCann had not established a prima facie case, the court of appeals reasoned, the racially biased remarks cited by McCann were legally irrelevant. "Because McCann has not made out a prima facie case of racial discrimination, her argument that pretext can be shown through language demonstrating discriminatory animus will also not be reached." (App. 10a n.6). In the absence of a "proper comparator," it does not matter whether an employer's proffered explanation for a disputed action is in fact a pretext for discrimination.

REASON FOR GRANTING THE WRIT

Repeated decisions of this Court have fashioned a now well-established method for organizing and evaluating claims of intentional discrimination. Once a plaintiff[5] establishes a prima facie case, the defendant must articulate a non-discriminatory reason for the disputed adverse action; the burden then returns to the plaintiff to establish by a preponderance of the evidence that the defendant acted with a discriminatory motive.[6] These shifting burdens are not intended

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[5] The same allocation is utilized in evaluating claims by a litigant (most frequently by a criminal defendant) that the opposing party has exercised a peremptory challenge in a discriminatory manner. *E.g., Johnson v. California*, 545 U.S. 162, 168-70 (2005).

[6] *Snyder v. Louisiana*, 128 S.Ct. 1203, 1207 (2008); *Rice v. Collins*, 546 U.S. 333, 338 (2006); *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005); *Johnson v. California*, 545 U.S. 162, 168 (2005); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142

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to create substantial intermediate barriers, but are "meant only to aid courts and litigants in arranging the presentation of evidence." *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 986 (1988). This Court has repeatedly emphasized that the plaintiff's initial burden of proving a prima facie case is "not onerous." *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989); *Watson*, 487 U.S. at 986; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

Despite this Court's disapproval of the imposition of any demanding evidentiary burden to establish a prima facie case, the Eleventh and Fifth Circuits have created a standard that two decades of experience have shown to be virtually impossible to meet. In a long series of decisions, of which the instant case is typical, those circuits require as essential element of a prima facie case[7] that the plaintiff identify a specific individual outside the protected group in question whose circumstances were "nearly identical"

(2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993); *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983); *Hernandez v. Texas*, 500 U.S. 352, 358 (1991); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 24-25 (1978); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577-78 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973).

[7] In the Eleventh Circuit a plaintiff unable to identify a nearly identical comparator might in theory be able to prove discrimination if he or she could produce "direct evidence" of discrimination. (App. 5a). The Eleventh Circuit's "direct evidence" standard, however, is also virtually impossible to satisfy.

to those of the plaintiff, and who nonetheless was treated more favorably. If, as here, no such nearly identical "proper comparator" exists, the plaintiff cannot establish a prima facie case, and the discrimination claim fails.

The district court below correctly characterized this rule as "stringent." (App. 32a). The Eleventh Circuit has applied the "nearly identical" requirement in 40 employment discrimination cases; the plaintiff was unable to meet that standard in every one of those cases.[8] In 2007 the "nearly identical" standard was invoked to dismiss discrimination claims in 30 district court decisions in the Eleventh Circuit.[9]

The "nearly identical" rule utilized in the Eleventh and Fifth Circuits has three distinct elements. *First*, to establish a prima facie case of a discriminatory adverse action (e.g., a dismissal, demotion, or suspension), a plaintiff must demonstrate that he or she was treated less favorably than a similarly situated individual who is not a member of the protected group in question. (App. 6a). *Second*, the individual with whom the plaintiff is compared is only similarly situated if the circumstances of that comparator and the plaintiff are "nearly identical." (App. 6a, 7a n.4) *Third*, the assessment of whether a comparator meets

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[8] A list of Eleventh Circuit decisions applying the "nearly identical" standard is set out in an Appendix to this petition.

[9] A list of those cases is set out in an Appendix to this petition.

the "nearly identical" standard is a matter for the courts, not the trier of fact. (App. 9a-10a). In each of these respects the rule in the Eleventh and Fifth Circuits has been expressly rejected by at least six other circuits.

In *Johnson v. California*, 545 U.S. 162 (2005), this Court granted certiorari to review a California rule that imposed an improperly restrictive standard for establishing a prima facie case of discrimination in the use of peremptory challenges. 545 U.S. at 170; see *Batson v. Kentucky*, 476 U.S. 79 (1986). The "nearly identical" standard utilized by the Eleventh and Fifth Circuits is even more stringent than that in *Johnson*. The practical importance of the "nearly identical" standard is significantly greater than the rule at issue in *Johnson*; the "nearly identical" standard is applied by federal courts in the six states in those two circuits, and the volume of employment discrimination in those circuits is far greater than the number of *Batson* claims in the California state courts.

I. THE ELEVENTH CIRCUIT REQUIREMENT THAT A PRIMA FACIE CASE MUST INCLUDE PROOF THAT A SIMILARLY SITUATED COMPARATOR RECEIVED MORE FAVORABLE TREATMENT CONFLICTS WITH THE STANDARDS IN SIX CIRCUITS

Applying well-established Eleventh Circuit precedent, the court of appeals held that to establish a prima facie case of discrimination the plaintiff was required to show that "her employer treated similarly

situated [white] employees more favorably." (App. 6a) (quoting *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1286 (11th Cir.2000)).[10] The Eleventh Circuit has for years required, as an essential element of a prima facie case, that the plaintiff prove that the employer accorded more favorable treatment to an individual outside the protected group of which the plaintiff was a member (e.g., in the instant case, to a white comparator). In 2007 the Eleventh Circuit reiterated that prima facie case requirement in 23 opinions.[11]

In the absence of that (or any other) essential element of a prima facie case, a plaintiff's claim fails as a matter of law. As a result, once the court of appeals in the instant case concluded that McCann "had not presented proper comparators" (App. 10a), and therefore had not established a prima facie case, her claim was dismissed without further inquiry. The existence of evidence of discriminatory motive – including Sheriff Tillman's asserted remarks about "niggers" – was simply irrelevant. "Because McCann has not made out a prima facie case of racial discrimination, her argument that pretext can be shown through language demonstrating discriminatory animus will also not be reached." (App. 10a n.6). In

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[10] In the absence of such a comparator, a plaintiff cannot make out a prima facie case "by showing that she did not violate her employer's work rule." *Jones v. Bessemer Carraway Medical Center*, 137 F.3d 1306, 1311 n.6 (11th Cir.1998).

[11] A list of those cases is set out in an Appendix to the petition.

the absence of a "proper comparator," under the decision below, the employer was entitled to prevail, regardless of whether McCann had other evidence tending to show the existence of an unlawful discriminatory purpose. "If two employees are not 'similarly situated,' the different application of workplace rules does not constitute illegal discrimination." *Lathem v. Department of Children and Youth Services*, 172 F.3d 786, 793 (11th Cir.1989); see *Wright v. Sanders Lead Co.*, 217 Fed.Appx. 925, 928 (11th Cir.2007) (same).

The Eleventh Circuit has repeatedly held, as it did in the instant case, that evidence of discriminatory remarks are irrelevant if a plaintiff cannot also identify a proper comparator who received more favorable treatment, and thus is unable to establish a prima facie case. In *Bell v. Capital Veneer Works*, 2007 WL 245875 (11th Cir.2007), the court of appeals upheld the dismissal of the plaintiff's discriminatory termination claim because, having failed to identify a "nearly identical" comparator, she was unable "to satisfy all elements of her prima facie case." 2007 WL 245875 at *2. The lack of a proper comparator was fatal to the plaintiff's claim despite evidence that the decisionmaker had earlier remarked "[i]f I could run the mill myself, I would fire everyone [sic] of these niggers." 2007 WL 245875 at *2 n.5. See *Tomczyk v. Jocks & Jills Restaurants, LLC*, 198 Fed.Appx. 804, 809 (11th Cir.2006) (discrimination claim dismissed for want of a proper comparator despite "a slew of vulgar and harassing comments" by the plaintiff's

supervisor "inflicted on [the plaintiff] because of race."); *Mack v. ST Mobile Aerospace Engineering, Inc.*, 195 Fed.Appx. 829, 838, 841 (11th Cir.2006) (discrimination claim dismissed for want of a proper comparator even though "management directed racial derogatory words and jokes, such as 'boy,' 'nigger,' and the statement that 'you're the wrong fucking color,' toward the plaintiff.... and supervisors continued to display the [Confederate] flag.")

The Fourth,[12] Fifth[13] and Seventh Circuits also require that a plaintiff prove more favorable treatment of a valid comparator in order to establish a prima facie case.[14] The Sixth Circuit has adopted a variant of the Eleventh Circuit prima facie case rule.[15] The Sixth Circuit explicitly disapproved the First Circuit rule that evidence of more favorable treatment of a comparator need only be considered in showing pretext, and not as an essential element of a

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[12] *Ford v. General Electric Lighting, LLC*, 121 Fed.Appx. 1, 5 (4th Cir.2005); *Cook v. CSX Transp. Corp.*, 988 F.2d 507, 501 (4th Cir.1993); *Moore v. City of Charlotte, NC*, 754 F.2d 1100, 1105-06 (4th Cir.1985).

[13] E.g., *Culwell v. City of Fort Worth*, 468 F.3d 868, 873 (5th Cir.2006); *Okoye v. University of Texas Houston Health Science Center*, 245 F.3d 507, 512-13 (5th Cir.2001).

[14] E.g., *Filar v. Board of Ed. of City of Chicago*, 526 F.3d 1054, 1060 (7th Cir.2008); *Atanus v. Perry*, 520 F.3d 662, 672-73 (7th Cir.2008).

[15] E.g., *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 707 (6th Cir.2006); *Driggers v. City of Owensboro, Ky.*, 110 Fed.Appx. 499, 506 (6th Cir.2004).

prima facie case. *Clayton v. Meijer, Inc.*, 281 F.3d 605, 609-10 (6th Cir.2002).[16]

A majority of the courts of appeals, however, have rejected this prima face case requirement. The First Circuit has expressly disapproved the Eleventh Circuit's rule.

> [T]he district court ... followed the lead of the Eleventh Circuit and construed the prima facie requirement to call for a "show[ing] that ... the misconduct for which [the plaintiff] was discharged was nearly identical to that engaged in by an employee outside the protected class whom the employer retained." *Conward* [*v. Cambridge School Committee*, 1998 WL 151248] at *3 (quoting *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1185 (11th Cir.1984))..... [T]he district court's sequencing determination was in error, for the time to consider comparative evidence in a disparate treatment case is at the third step of the burden-shifting ritual,

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[16] Clayton urges this Court to adopt the standard articulated by the First Circuit in *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 19 (1st Cir.1999).... [T]his Court has not adopted the formulation set forth by the First Circuit in *Conward*.... [T]he district court correctly held that the plaintiff must prove that he was either replaced by a person outside of the protected group or show that similarly situated, non-protected employees were treated more favorably.

281 F.3d at 609-10 (footnote omitted).

> when the need arises to test the pretextuality *vel non* of the employer's articulated reason....

Conward v. Cambridge School Committee, 171 F.3d 12, 19 (1st Cir.1999).[17]

The Second Circuit holds that a plaintiff, in order to establish a prima facie case, need only show that the disputed adverse action "occurred under circumstances giving rise to an inference of discrimination." *Graham v. Long Island Rail Road*, 230 F.3d 34, 38 (2d Cir.2000). "A plaintiff *may* raise such an inference by showing that the employer ... treated him less favorably than a similarly situated employee outside his protected group," *id.* at 39 (emphasis added), but is not limited to that particular method of proof.

> Defendants are wrong in their contention that [a plaintiff] cannot make out a claim that survives summary judgment unless she demonstrates that the defendants treated similarly situated men differently....

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[17] *Kosereis v. Rhode Island*, 331 F.3d 207, 211 (1st Cir.2003) ("in disparate treatment cases, comparative evidence is to be treated as part of the pretext analysis, and not as part of the plaintiff's prima facie case"); *Fernandes v. Costa Brothers Masonry, Inc.*, 199 F.3d 572, 684 (1st Cir.1999) ("[c]ontrary to [the defendant's] contention, a plaintiff need not show as part of his prima facie case that the employer either recalled similarly situated non-minority employees or otherwise treated employees of different ethnic backgrounds more favorably.").

> Although her case would be stronger had she provided ... such evidence, there is no requirement that such evidence be adduced.

Back v. Hastings on Hudson Union Free School District, 365 F.3d 107, 121 (2d Cir.2004).

The Third Circuit has also rejected the Eleventh Circuit prima facie case rule. In *Marzano v. Computer Science Corp., Inc.*, 91 F.3d 497 (3d Cir.1996), the defendants argued that the standard for a prima facie case "encompasses the requirement that plaintiff show that *similarly situated* unprotected employees [were treated more favorably.]" 91 F.3d at 510 (quoting brief for employer) (emphasis in opinion). The Third Circuit rejected that proposed requirement in language that aptly described the fatal flaw in the Eleventh Circuit's "nearly identical" standard.

> [W]e reject Defendants' argument because it would seriously undermine legal protections against discrimination. Under their scheme, any employee whose employer can for some reason or other classify him or her as "unique" would no longer be allowed to demonstrate discrimination inferentially, but would be in the oft-impossible situation of having to offer direct proof of discrimination.... [A]rguments as to the employee's uniqueness should be considered in conjunction with, and as part of, the employer's rebuttal – not at the prima facie stage.

91 F.3d at 510-11.

In *Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th Cir.2004),

> [t]he district court employed a *prima facie* test requiring [the plaintiff] to show that other similarly situated employees outside of the protected class were treated more favorably.

366 F.3d at 744. The Ninth Circuit held that the district court had erred in limiting in that way the manner in which a plaintiff may establish a prima facie case.

> A plaintiff may show *either* that similarly situated individuals outside her protected class were treated differently *or* "other circumstances surrounding the adverse employment action give rise to an inference of discrimination."

Id. (emphasis in original; quoting *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir.2004)).

The Tenth Circuit has repeatedly rejected the Eleventh Circuit position that a plaintiff must demonstrate the existence of a valid comparator in order to establish a prima facie case. In *Nguyen v. Gambro BCT, Inc.*, 242 Fed.Appx. 483 (10th Cir.2007), the district court had applied that Eleventh Circuit standard, requiring the plaintiff to show that she was "treated less favorably than a person outside the protected group." 242 Fed.Appx. at 487. The Tenth Circuit expressly disapproved that standard for establishing a prima facie case.

> The district court erred ... in its articulation and application of prima facie case standards.... We held in *Kendrick* [*v. Penske Transp. Servs., Inc.*, 220 F.3d 1220 (10th Cir.2000)] that the lower court committed error "in requiring [plaintiff] to show that [the employer] treated similarly-situated nonminority employees differently in order to [establish a prima facie case]." [220 F.3d at 1229]; *see also English v. Colo. Dept. of Corrections*, 248 F.3d 1002, 1008 (10th Cir.2001) ("[I]n disciplinary discharge cases ... a plaintiff does not have to show differential treatment of persons outside the protected class to meet the initial prima facie burden....")

242 Fed.Appx. at 488.

The District of Columbia Circuit has also rejected the Eleventh Circuit rule. In *Czekalski v. Peters*, 475 F.3d 360 (D.C.Cir.2007), the district court had held that to establish a prima facie case a plaintiff "must demonstrate that she and a similarly situated person outside her protected class were treated disparately." 475 F.3d at 365. The District of Columbia Circuit disapproved that standard. "As we said in *George v. Leavitt* [407 F.3d 405 (D.C.Cir.2005)], ... '[t]his is not a correct statement of the law.' 407 F.3d at 412." *Id.*

> One method by which a plaintiff can satisfy [the prima facie case standard] is by demonstrating that she was treated differently from similarly situated employees who are

> not part of the protected class.... But that is not the only way.

George v. Leavitt, 407 F.3d at 412.

II. THE ELEVENTH CIRCUIT "NEARLY IDENTICAL" STANDARD CONFLICTS WITH THE STANDARDS IN NINE CIRCUITS

A. The decision below applied the well-established Eleventh Circuit rule that comparative evidence is not sufficient to sustain a prima facie case unless the plaintiff and the proffered comparator are "nearly identical." (App. 6a, 7a n.4). The Fifth Circuit applies the same "nearly identical" standard.[18] Lower courts utilizing this standard have correctly characterized it as "stringent,"[19] "rigorous,"[20] "high"[21] "exacting,"[22] "strict"[23] and "demanding."[24] Practical experience has demonstrated that the

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[18] E.g., *Culwell v. City of Fort Worth*, 468 F.3d 868, 873 (5th Cir.2007); *Perez v. Texas Dept. of Criminal Justice, Institutional Division*, 395 F.3d 206, 213 (5th Cir.2004).

[19] App. 32a.

[20] *Rioux v. City of Atlanta, Ga.*, 520 F.3d 1269, 1281 (11th Cir.2008).

[21] See n.43, *infra*.

[22] *Woods v. Potter*, 2008 WL 1869272 at * 5 (N.D.Tex.2008).

[23] *DeLuna v. Cheers, Inc.*, 2007 WL 708561 at *6 (W.D.Tex.2007).

[24] *Waters v. U.S. Capitol Police Bd.*, 216 F.R.D. 153, 158 (D.D.C.2003).

"nearly identical" standard is virtually impossible to satisfy. See p. 9, *supra*.

The instant case sharply illustrates the exactitude required by the "nearly identical" standard. The Eleventh Circuit held that to constitute a "[p]roper comparator" a white officer would have to meet five requirements: (a) be "on duty" rather than off duty at the time of the incident in question, (b) be "in uniform" not "in plainclothes," (3) act "in public" not "at a private residence," (4) direct his or her actions at "a high-ranking officer of a neighboring county" not at "a civilian," and (5) act to further "a personal goal." (App. 9a). That combination of characteristics is so unique that it is unlikely that any officer in the entire state of Alabama, other than the plaintiff herself, would fit that description.

Nine circuits have rejected this avowedly stringent standard. Under the less exacting standard applied in a majority of the circuits, unlike the draconian impact of the Eleventh Circuit standard, the sufficiency of comparative evidence is routinely upheld.

B. Six circuits, applying the same standard both at the prima facie case stage and in evaluating evidence of pretext, utilize a standard demonstrably different from and manifestly less restrictive than the "nearly identical" standard.

Four circuits apply in discriminatory discipline claims a requirement that the action of a proffered comparator need only be of "comparable seriousness"

to that for which the plaintiff was punished. That standard is utilized in the Second,[25] Fourth,[26] Sixth[27] and Seventh Circuits.[28] Plaintiffs are routinely able to satisfy this less stringent requirement.

Applying the "comparable seriousness" standard, for example, the Second Circuit has held that excessive absenteeism and engaging in the prohibited use of alcohol might reasonably be deemed of comparable seriousness, even though those infractions manifestly would not satisfy the "nearly identical" test.[29] The Second Circuit has expressly refused to require proof that the plaintiff and comparator had engaged in the same offense, reasoning that under such a requirement a plaintiff could not rely on evidence of more favorable treatment of a comparator whose record was worse (and thus different) than that of the plaintiff.[30]

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[25] *Graham v. Long Island Rail Road*, 230 F.3d 34, 40 (2d Cir.2000); *Hargett v. National Westminster Bank, USA*, 78 F.3d 836, 840 (2d Cir.1996); *Lieberman v. Gant*, 630 F.3d 60, 67 (2d Cir.1980).

[26] *Featherstone v. United Parcel Services, Inc.*, 1995 WL 318596 at *4-*5 (4th Cir.1995); *Cook v. CSX Transp. Corp.*, 988 F.2d 507, 511 (4th Cir.1993); *Moore v. City of Charlotte, NC*, 754 F.2d 1100, 1105-06 (4th Cir.1985).

[27] *Perry v. McGinnis*, 209 F.3d 597, 602 (6th Cir.2000); *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 660-61 (6th Cir.1999).

[28] *Pierick v. Indiana University-Purdue University Athletics Dept.*, 510 F.3d 681, 690 (7th Cir.2007).

[29] *Graham*, 230 F.3d at 43.

[30] *Id.* at 40.

The Fourth Circuit has made clear that the comparable seriousness standard can be satisfied even where the asserted infractions of a plaintiff are different than those of a proposed comparator.

> [T]he district court found that "although ... there were [not] any white employees charged with the same combination of offenses as plaintiff," several white employees had violated [a particular general rule], "the primary offense which had led to plaintiff's dismissal," and therefore had engaged in conduct of "comparable seriousness" to that of [the plaintiff]. That finding commendably reflects an understanding ... of the reality that the comparison will never involve precisely the same set of work-related offenses occurring over the same period of time and under the same sets of circumstances.

Cook v. CSX Transp. Corp., 988 F.2d 507, 511 (4th Cir.1993).

Decisions in the Seventh Circuit, in addition to at times using the "comparable seriousness" standard, have also articulated alternative tests. Panels in this circuit have required that a plaintiff control for "confounding variables,"[31] or demonstrate enough similarities to permit a "meaningful comparison,"[32] or held that the courts in deciding this issue should

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[31] *Filar*, 526 F.3d at 1061.

[32] *Keys v. Foamex, L.P.*, 264 Fed.Appx. 507, 512 (7th Cir.2008).

consider all "material" factors[33] or examine a particular list of considerations.[34] Decisions in the Seventh Circuit have held a plaintiff's evidence sufficient under every one of these standards.[35] The general tenor of these decisions is reflected in a recent opinion stressing that "a plaintiff need not present a doppelganger,"[36] and in several decisions emphasizing that the "similarly situated" requirement should be applied in a "flexible" rather than a "mechanica[l]," "unduly rigid" or "narrow" manner.[37] In *Ezell v. Potter*, 400 F.3d 1041 (7th Cir.2005), for example, the Seventh Circuit held that a postal worker disciplined for claiming pay for a period he had not worked could be compared to workers who had lost certified mail or altered records, even though these clearly were not "the same infraction." 400 F.3d at 1049-50.

The Third Circuit does not utilize any specific standard for evaluating comparative evidence. Most frequently decisions in that circuit merely inquire whether the circumstances of the plaintiff and the proposed comparator are "similar," or simply compare the circumstances at issue. E.g., *Goosby v. Johnson &*

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[33] *Henry v. Jones*, 507 F.3d 558, 564 (7th Cir.2008).

[34] *Ezell v. Potter*, 400 F.3d 1041, 1049 (7th Cir.2005) (plaintiff and comparator must be "similarly situated with respect to performance, qualifications and conduct").

[35] See cases cited in nn.31-34.

[36] *Filar*, 526 F.3d at 1061.

[37] *Atanus*, 520 F.3d at 673; *Keys*, 264 Fed.Appx. at 512; *Henry*, 507 F.3d at 564; *Pierick*, 510 F.3d at 688.

Johnson Medical, Inc., 228 F.3d 313, 321 (3d Cir.2000) (evidence sufficient to support finding that plaintiff and comparators had "similar weaknesses") (opinion by Alito, J.). Under both approaches the Third Circuit has repeatedly found comparative evidence sufficient to support an inference of discrimination.[38] In *Bennun v. Rutgers State University*, 941 F.2d 154 (3d Cir.1991), for example, that circuit upheld the use of evidence comparing the treatment of a white and a Hispanic candidate for tenure, even though their particular strengths and weaknesses were somewhat different.

> Rutgers contends that they are not similarly situated because [the white candidate] was rated outstanding in two [particular] categories ... and [the Hispanic candidate] was not rated as highly in those categories. We cannot accept Rutgers' position. It would change "similarly situated" to "identically situated."

941 F.2d at 178.

The First Circuit holds that comparative evidence is probative so long as the circumstances of the plaintiff and the comparator are "roughly equivalent."

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[38] *Messina v. E.I. DuPont de Nemours & Co., Inc.*, 141 Fed.Appx. 57, 59 (3d Cir.2005) (comparative evidence sufficient to support prima facie case, even though misconduct of plaintiff was worse than that of comparator); *Hopp v. City of Pittsburgh*, 194 F.3d 434, 439 (3d Cir.1999) (finding of discrimination supported by evidence of more favorable treatment of "similarly situated" comparators) (opinion by Alito, J.).

That circuit has repeatedly found plaintiffs' comparative evidence sufficient to meet this less stringent standard.[39]

C. Three circuits utilize a two-tier standard for analyzing comparative evidence, applying a decidedly less demanding standard in determining whether that type of evidence is sufficient to establish a prima facie case.

The Eighth Circuit is particularly explicit in recognizing two different standards.

> At the prima facie case stage ... , we choose to follow the low-threshold standard for determining whether employees are similarly situated.... Using a more rigorous standard at the prima facie stage would "conflate the prima facie case with the ultimate issue of discrimination ..."

Rogers v. U.S. Bank, N.A., 417 F.3d 845, 852 (8th Cir.2005) (*quoting Williams v. Ford Motor Co.*, 14 F.3d 1305, 1308 (8th Cir.1994). Under this avowedly "not onerous" standard a plaintiff and comparator need only have engaged in "similar" conduct. *Rogers*, 417 F.3d at 851; see *Wheeler v. Aventis Pharmaceuticals*, 360 F.3d 853, 857-58 (8th Cir.2004) (circumstances

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[39] *Carey v. Mt. Desert Island Hospital*, 156 F.3d 31, 37 (1st Cir.1998); *Molloy v. Blanchard*, 115 F.3d 86, 92 (1st Cir.1997); *Scarfo v. Cabletron Systems, Inc.*, 54 F.3d 931, 942 (1st Cir.1995); *United States v. Massachusetts Maritime Academy*, 762 F.3d 142, 155 (1st Cir.1985).

need only be "arguably ... comparable"). "[D]ifferences in the severity and frequency of their violations and the surrounding circumstances" are irrelevant at the prima facie case stage, but should be considered only in determining whether the plaintiff has shown pretext. *Rogers*, 417 F.3d at 52.

In evaluating whether comparative evidence would support a finding of pretext, the Eighth Circuit requires proof of infractions of "comparable seriousness. Even under that more demanding standard, however, the Eighth Circuit has expressly refused to require that the plaintiff and the comparator have committed the same infraction.

> To require that employees always have to engage in the exact same offense as a prerequisite for finding them similarly situated would result in a scenario where evidence of favorable treatment of an employee who has committed a different but more serious, perhaps even criminal offense, could never be relevant to prove discrimination.

Lynn v. Deaconess Medical Center-West Campus, 160 F.3d 484, 488 (8th Cir.1998). The Eighth Circuit has repeatedly upheld the sufficiency of evidence under this comparable seriousness standard.[40]

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[40] *Ledbetter v. Alltel Corp. Services, Inc.*, 437 F.3d 717, 723 (8th Cir.2006); *EEOC v. Kohler Co.*, 335 F.3d 766, 776 (8th Cir.2003); *Warren v. Prejean*, 301 F.3d 893, 903 (8th Cir.2002); *Lynn*, 160 F.3d at 488.

The Tenth Circuit also takes a different approach to assessing whether comparative evidence supports a prima facie case and whether comparative evidence would support a finding of discrimination. At the prima facie case stage, the standard is avowedly "not onerous." *Smith v. Oklahoma ex rel. Tulsa County District Attorney*, 245 Fed.Appx. 807, 812 (10th Cir.2007). That circuit does not consider at the prima facie case stage an employer's explanation for the differing treatment of seemingly similar employees.

> Although the district court concluded that th[e] ... male employees were not similarly situated, its analysis turned on an assessment of the reasons offered by the [employer] for [the plaintiff's] termination.... However, at the prima facie case stage ... "the employer's reasons for the adverse action are not appropriately brought as a challenge to the sufficiency of the plaintiff's prima facie case...."

Id. (*quoting Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1469-70 (10th Cir.1992)). At the pretext stage, on the other hand, the Tenth Circuit does consider the defendant's proffered explanation, applying the "comparable seriousness" standard in evaluating the comparative evidence. In *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249 (10th Cir.1988), that court of appeals upheld a jury verdict based on comparative evidence, despite the fact that the plaintiff and the comparators had committed "different rule violations."

> The fact that these other employees did not commit the exact same offense as [the plaintiff] does not prohibit consideration of their testimony. It is sufficient if those employees did acts of comparable seriousness.

851 F.2d at 1261; see *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 489-90 (10th Cir.2006) (despite "factual differences" between the incidents, "[t]hey are similar enough"), *cert. dismissed*, 127 S.Ct. 1931 (2007).

The Ninth Circuit uses the "comparable seriousness" standard to determine whether comparative evidence is probative of pretext.[41] At the prima facie case stage, however, that circuit appears in practice to use a less demanding standard, emphasizing that plaintiffs need provide "very little" evidence to establish a prima facie case based on such evidence.[42]

D. The existence of this inter-circuit conflict reflects quite deliberate decisions by the various circuits to reject standards applied in other circuits.

In *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir.1994), the district court had applied a definition of "similarly situated" similar to the Eleventh Circuit "nearly identical" standard, requiring in a discipline

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[41] *Beck v. United Food and Commercial Workers Union, Local 99*, 506 F.3d 874, 885 (9th Cir.2007).

[42] *Fields v. Riverside Cement Co.*, 226 Fed.Appx. 719, 722 (9th Cir.2007); see *Cornwell v. Electra Central Credit Union*, 439 F.3d 1018, 1031 (9th Cir.2006).

case that the comparator's infractions be of the same "kind, number and scope" as those of the plaintiff. 30 F.3d at 432. The Third Circuit reversed. "[T]he district court's definition of 'similarly situated' was too narrow.... ['P]recise equivalence in culpability between employees is not the question.[']" 30 F.3d at 433 (*quoting McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976)).

In *Jackson v. Fedex Corporate Services, Inc.*, 518 F.3d 388 (6th Cir.2008), the district court had applied an avowedly "high standard,"[43] 518 F.3d at 391, 392, holding that the plaintiff had failed to identify a valid comparator, and thus had not made out a prima facie case, because "to be similarly situated [the comparator] with whom the Plaintiff seeks to compare treatment must have the same supervisor, be subject to the same standards, having engaged in similar conduct without differentials or mitigation." 518 F.3d at 391. The Sixth Circuit rejected that standard.

> The district court's formulation of the similarly situated standard is exceedingly narrow.... The *prima facie* case requirement is not onerous.... [T]he district court impermissibly placed a burden of producing a significant amount of evidence in order to establish a *prima facie* case. The purpose[s] of Title

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[43] "High standard" is precisely the phrase used by district courts in the Eleventh Circuit to characterize the "nearly identical" rule. E.g., *Zedeck v. Target Corp.*, 2008 WL 2225661 at *7 (S.D.Fla.2008).

> VII and Section 1981 are not served by an overly narrow application of the similarly situated standard.... Jackson held a unique position within [his unit].... The district court's narrow definition of similarly situated effectively removed Jackson from the protective reach of the antidiscrimination laws.

518 F.3d at 396-97.

In *Josephs v. Pacific Bell*, 443 F.3d 1050 (9th Cir.2005), the Ninth Circuit expressly rejected the "nearly identical standard." The employer, relying on Fifth Circuit precedent, argued that comparative evidence is inadmissible unless the comparator is "nearly identical" to the plaintiff.[44] The court of appeals held that to be admissible such evidence need only involve "similar conduct." 443 F.3d at 1065.

In *Cuevas v. American Express Travel Related Services Co., Inc.*, 256 Fed.Appx. 241 (11th Cir.2007), on the other hand, the Eleventh Circuit expressly rejected the plaintiff's contention that comparative evidence should be evaluated under the "comparable seriousness" standard utilized in seven other circuits. The court of appeals' cases supporting use of that standard were "contradict[ed]" by controlling Eleventh Circuit precedent. 256 Fed.Appx. at 243. In *Perez v. Texas Dept. of Criminal Justice Institutional*

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[44] Brief of Defendant-Appellant, 2004 WL 5367149 at *47 (citing *Okoye v. University of Texas Houston Health Science Center*, 255 F.3d 507 (5th Cir.2001)).

Div., 395 F.3d 206 (5th Cir.2004), a jury found that the plaintiff had been discharged because of his race. On appeal the defendant objected that the jury had been instructed that it could find that the plaintiff and proffered white comparators were similarly situated if their misconduct was "of comparable seriousness." The Fifth Circuit held that the "comparable seriousness" instruction was improper.

> In instructing, without more, that the employees' underlying misconduct must be comparably serious, the district court erroneously suggested that comparably serious misconduct was by itself enough to make employees similarly situated. A correctly worded instruction would have made clear that the jury must find the employees' circumstances to have been nearly identical in order to find them similarly situated.

395 F.3d at 213.

In 2000 and 2001, in a brief departure from Eleventh Circuit precedent, two panels in that circuit held that "the law only requires 'similar' misconduct from the similarly situated comparator," not "nearly identical conduct." *Anderson v. WBMG-42*, 253 F.3d 561, 565 (11th Cir.2001); *Alexander v. Fulton County*, 207 F.3d 1303, 1334-35 (11th Cir.2000). Judges in the Eleventh Circuit squarely recognized that the standard in these decisions was inconsistent with that

circuit's usual "nearly identical" standard.[45] In *Burke-Fowler v. Orange County, Fla.*, 447 F.3d 1319 (11th Cir.2006), the Eleventh Circuit reaffirmed its commitment to the "nearly identical" standard, explaining that the decisions in *Anderson* and *Alexander* "contradict[ ]" prior Eleventh Circuit precedent, and invoking that circuit's "'earliest case' rule to resolve intra-circuit splits." 447 F.3d at 1322 n.2; see App. 30a n.5 (*Burke-Fowler* "resolved the intra-circuit conflict"). The *inter*-circuit conflict, however, remains.

III. THE ELEVENTH CIRCUIT RULE THAT COURTS ARE TO DETERMINE WHETHER COMPARATORS ARE SUFFICIENTLY SIMILAR CONFLICTS WITH THE STANDARDS IN SIX CIRCUITS

Proceeding in a manner consistent with long-standing Eleventh Circuit practice, the panel in this case made its own determination as to whether the proffered comparators were sufficiently similar to the plaintiff, rather than treating those circumstances as evidence to be evaluated by the trier of fact. (App. 9a,

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[45] *Dawson v. Henry County Police Dept.*, 238 Fed.Appx. 545, 548 n.2 (11th Cir.2007) (*Anderson* and *Alexander* standard "less exacting" than the "nearly identical" rule); *Wright v. Sanders Lead Co., Inc.*, 2006 Wl 905336 at *8 (M.D.Ala.2006) (*Anderson* and *Alexander* standard "less stringent" than the "nearly identical" rule).

10a) The Fourth,[46] Fifth,[47] and Seventh[48] Circuits also deem that determination to be the province of the courts, as if it were some sort of question of law, rather than according to a jury the responsibility for deciding whether or not a proffered comparison is persuasive. Six other circuits, however, properly regard the trier of fact as responsible for determining whether the plaintiff and a proffered comparator are sufficiently similar that dissimilar treatment raises an inference of discrimination.

The Second Circuit has repeatedly held that "[w]hether two employees are similarly situated ordinarily presents a question of fact for the jury." *Graham v. Long Island Rail Road*, 230 F.3d 34, 39 (2d Cir.2000).[49] The District of Columbia Circuit also

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[46] E.g., *Ray v. CSX Transp., Inc.*, 189 Fed.Appx. 154, 160 (4th Cir.2006) ("the coworkers ... were not engaged in conduct of comparable seriousness").

[47] E.g., *Bouie v. Equistar Chemicals L.P.*, 188 Fed.Appx. 233, 237 (5th Cir.2006) (plaintiff's "situation is not nearly identical to that of the white employees who were not fired").

[48] E.g., *Fischer v. Avanade, Inc.*, 519 F.3d 393, 402 (7th Cir.2008) ("we find these two individuals were similarly situated").

[49] *Brown v. City of Syracuse*, 2006 WL 2091206 at *3 (2d Cir.2006) (*quoting Graham*); *Feingold v. New York*, 366 F.3d 138, 154 (2d Cir.2004) ("whether or not the non-disciplined [comparators] were similarly situated is a matter of factual dispute which is best resolved by a finder-of-fact"); *Mandell v. County of Suffolk*, 316 F.3d 368, 379 (2d Cir.2003) ("Ordinarily, the question whether two employees are similarly situated is a question of fact for the jury.").

treats this as a matter for resolution by the trier of fact. *George v. Leavitt*, 407 F.3d 405, 414 (D.C.Cir.2005) (*quoting Graham*).

> [I]t should be resolved in the first instance by a jury, whose decision should be disturbed on appeal only if it could not reasonably be based upon the evidence properly received.

Barbour v. Browner, 181 F.3d 1342, 1345 (D.C.Cir.1999). The Tenth Circuit as well treats this issue as a question of fact for the jury. *Riggs v. Airtran Airways, Inc.*, 497 F.3d 1108, 1117 (10th Cir.2007) (*quoting George*). The Ninth Circuit "agree[s] with our sister circuits that whether two employees are similarly situated is ordinarily a question of fact." *Beck v. United Food and Commercial Workers Union, Local 99*, 506 F.3d 874, 885 n.5 (9th Cir.2007) (citing decisions in the Second, Tenth and District of Columbia Circuits).

In *Molloy v. Blanchard*, 115 F.3d 86 (1st Cir.1997), the First Circuit upheld a jury's finding of discrimination reasoning, in part, that the plaintiff had "presented evidence sufficient for the jury to have found that ... 'similarly situated' males had received dissimilar treatment." 115 F.3d at 92. In a series of decisions the Third Circuit also has held that the trier of fact is responsible for evaluating whether a comparator is similarly situated with the plaintiff.[50]

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[50] *Messina v. E.I. DuPont de Nemours & Co., Inc.*, 141 Fed.Appx. 57, 59 (3d Cir.2005) (comparative evidence "sufficient

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The most recent Sixth Circuit decision insists that the evaluation of comparative evidence should be made by the trier of fact, so long as "a reasonable jury could infer that [the comparator's] conduct was of comparable seriousness." *Macy v. Hopkins County School Bd. of Educ.*, 484 F.3d 357, 369-71 and n.8 (6th Cir.2007).

IV. THE ELEVENTH CIRCUIT'S "NEARLY IDENTICAL" PRIMA FACIE CASE RULE CONFLICTS WITH THE DECISIONS OF THIS COURT

A. The Eleventh Circuit's insistence that a prima facie case must include evidence of differing treatment of a similarly situated comparator (however defined) is inconsistent with the decisions of this Court. "The *prima facie* case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic.'" *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711,

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... at the prima facie stage for a reasonable fact finder to conclude that [the defendant] treated [plaintiff] less favorably than others because of his race"); *McNulty v. Citadel Broadcasting Co.* 58 Fed.Appx. 556, 563 (3d Cir.2003) ("[t]aken in the light most favorable to McNulty, the evidence ... is sufficient to convince a reasonable fact-finder that similarly situated younger employees were transferred rather than terminated"); *Bennun v. Rutgers State University*, 941 F.2d 154, 179 (3d Cir.1991) ("factfinder ... did not clearly err by drawing the conclusion that differing standards were applied [to plaintiff and to comparator]").

715 (1983) (*quoting Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978)). *Johnson v. California*, 545 U.S. 162 (2005), explained that

> a prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives "rise to an inference of discriminatory purpose."

545 U.S. at 169 (*quoting Batson*, 476 U.S. at 94) (footnote omitted). The application of any fixed formulation as to the elements of a prima facie case are inconsistent with *Johnson* and *Aikens*.

The particular rigid prima facie case rule established by the Eleventh Circuit – requiring (at least in discipline and dismissal cases) proof of a similarly situated comparator – is inconsistent with this Court's decision in *United States v. Armstrong*, 517 U.S. 456 (1996). *Armstrong* held that in the special circumstances of a claim of race-based selective prosecution the defendant asserting such a claim must as part of his prima facie case identify individuals of a different race who had engaged in the same conduct but had not been prosecuted. That decision, however, was expressly limited to selective prosecution claims, which touch upon the unique discretion of the Executive Branch, and which unless carefully limited could chill law enforcement. 517 U.S. at 464-66. *Armstrong* made clear that this requirement did not apply to ordinary discrimination claims, such as a *Batson* claim, 517 U.S. at 467. The United States in *Armstrong* emphasized that that similarly situated

comparator requirement should be limited to selective prosecution cases, and would not be appropriate in resolving a Title VII or *Batson* claim.[51]

B. The "nearly identical" standard utilized by the Eleventh and Fifth Circuits is also inconsistent with the decisions of this Court. This Court has repeatedly held that the standard for establishing a prima facie case is "not onerous." (See p. 8, *supra*). "Onerous" is precisely the term for the Eleventh Circuit's "nearly identical" standard, a standard which no appellate litigant in an employment discrimination case in that circuit has been able to satisfy.

The decision below asserts that under Eleventh Circuit precedent a comparator need not be identical to the plaintiff, only "nearly identical." (App. 7a n.4). But this distinction exists only in theory. Years of experience demonstrate that the "nearly identical" standard is almost impossible to meet; in practice the Eleventh Circuit "nearly identical" standard is indistinguishable from a requirement that the comparator actually be identical to the plaintiff. That is a requirement which this Court has expressly rejected.

> None of our cases announces a rule that no comparison is probative unless the situation of the individuals is identical in all respects, and there is no reason to accept one.... A *per se* rule that a defendant cannot win a *Batson*

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[51] Reply Brief for the United States, No. 95-157, at 12.

> claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

Miller-El v. Dretke, 545 U.S. 231, 247 n.6 (2005). "Inoperable" is precisely what the federal prohibitions against discrimination become when subject to the "nearly identical" rule.

Decisions in the Eleventh and Fifth Circuits have emphatically rejected suggestions that a plaintiff could rely on evidence of more favorable treatment of a comparator who was merely "similar," or whose misconduct was of "comparable seriousness" to that of the plaintiff. See 30-31, *supra*. But those are precisely the standards approved by this Court. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court emphasized that in evaluating Green's discrimination claim

> [e]specially relevant ... would be evidence that white employees involved in acts against [the employer] of *comparable seriousness* to [the actions of the plaintiff] were nevertheless retained or rehired.

411 U.S. at 804 (emphasis added). *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), reiterated that standard.

> Of course, precise equivalence in culpability between employees is not the ultimate question.... [T]hat other "employees involved in

> acts [against the employer's rules] of *comparable seriousness* ... were nevertheless retained ... " is adequate....

427 U.S. at 283 n.11 (emphasis added; *quoting McDonnell Douglas*).

In *Miller-El v. Dretke*, 545 U.S. 231 (2005), the standard applied by this Court was whether white and black prospective jurors were "similarly situated." 545 U.S. at 247 n.6. The Court found probative comparisons of white and black jurors who were merely "much [a]like" or "comparable," 545 U.S. at 248, 250 n.8, noting as to one pair of jurors that there were "strong similarities as well as some differences." 545 U.S. at 247. That comparative evidence was relied on to support, not a mere prima facie case, but a determination by this Court that the trial court's failure to find intentional discrimination was "wrong to a clear and convincing degree."

In *Snyder v. Louisiana*, 128 S.Ct. 1203 (2008), this Court found probative the fact that a white juror had a "substantially more pressing" need to avoid jury service (business obligations, a sick wife, and children to take to and from school) than the black prospective juror who was removed (the need to make up two days of student teaching). (128 S.Ct. at 1211). Under the "nearly identical" standard that evidence would have been dismissed precisely because the white juror's obligations were entirely different from those of the black juror. If a comparison short of near identity is sufficient to demonstrate the exceptional

circumstances needed to overturn on appeal a *Batson* claim rejected by a trial court, surely that evidence can be sufficient to meet the far less demanding standard of establishing a mere prima facie case.

The Eleventh Circuit's "nearly identical" rule is indistinguishable from the California prima facie rule rejected in *Johnson v. California*, 545 U.S. 162 (2005). The state courts in that case had held that to establish a prima facie case of a *Batson* violation a litigant must "show that it is more likely than not [that] the other party's peremptory challenges, if unexplained, were based on impermissible group bias." 545 U.S. at 168 (*quoting People v. Johnson*, 30 Cal.4th 1302, 1318, 71 P.2d 270, 280 (2003)). This Court rejected that standard as unduly burdensome. The Eleventh Circuit "nearly identical" requirement is, if anything, more stringent than the California standard disapproved in *Johnson*. Evidence that a white comparator had been treated more favorably despite "nearly identical" circumstances would indeed demonstrate – if unexplained – that discrimination was "more likely than not." The Eleventh Circuit standard differs from the California standard rejected in *Johnson* only in that the Court of Appeals restricts litigants to use of only a single type of evidence – proof of a "nearly identical" comparator – to meet that legally excessive burden.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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United States Court of Appeals, Eleventh Circuit.

Georgia McCANN, Plaintiff-Appellant,

v.

Jack TILLMAN, Michael Haley, David Turner, Melissa Bounds, Mobile County Personnel Board, Defendants-Appellees.

No. 07-11743.

May 9, 2008.

Jerry D. Roberson, Roberson & Roberson, Birmingham, AL, for McCann.

K. Paul Carbo, Jr., The Atchison Firm, P.C., Mobile, AL, for Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama.

Before CARNES and BLACK, Circuit Judges, and RESTANI*, Judge.

RESTANI, Judge:

Appellant Georgia McCann appeals the district court's grant of summary judgment in her suit alleging race discrimination, retaliation, and a hostile work environment under 42 U.S.C. §§ 1981 and 1983. We affirm.

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* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

BACKGROUND

Georgia McCann ("McCann") has been employed as a correctional officer for the Mobile County Sheriff's Office since 1993. From 2003 until September 2005, McCann was assigned to the Metro Barracks of the Mobile County Jail, and her chain of command included her supervisor, Corrections Lieutenant Melinda Bounds,[1] Deputy Warden David Turner, Warden Michael Haley, and Sheriff Jack Tillman.

On June 1, 2004, McCann was on her way to work when she was notified that her son was incarcerated in Washington County. McCann obtained permission to use an emergency vacation day and went to the Washington County jail still wearing her correctional officer uniform. On June 4, 2004, Sheriff Wheat of Washington County wrote a letter to the Mobile County Sheriff's Office complaining about McCann's irrational and disrespectful behavior towards him and his deputies while at the Washington County jail. In July 2004, a pre-disciplinary hearing panel determined McCann was guilty of conduct unbecoming an employee in the public service, disorderly conduct, and of violating a lawful and reasonable regulation issued in November 2003, forbidding employees to wear their uniforms off-duty. Sheriff Tillman subsequently suspended McCann

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[1] The complaint incorrectly identifies Melinda Bounds as "Melissa." *McCann v. Mobile County Personnel Bd.*, No. 05-0364-WS, 2006 WL 1867486, at *1 n. 1 (S.D.Ala.2006).

without pay for fifteen days, with five days deferred pending six months of good behavior. McCann appealed the decision to the Mobile County Personnel Board, which affirmed the pre-disciplinary panel's determination finding McCann guilty of the charges brought against her and extended her suspension to fifteen days with none deferred.

In August 2004, McCann received an unsatisfactory service rating, due in part to her suspension, which made her ineligible for promotion. McCann was also prevented from working overtime due to a recent policy instituted by Bounds forbidding disciplined officers from working overtime for ninety days after returning to work. In January 2005, McCann filed a charge of discrimination with the EEOC, alleging a hostile work environment. In June 2005, McCann filed suit against Bounds, Turner, Haley, Tillman, and the Mobile County Personnel Board[2] (collectively "Appellees"), alleging that she had [sic] was subjected to racial discrimination, retaliation, and a hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. §§ 1981 and 1983.

On July 6, 2006, the district court granted Bounds, Turner, Haley, and Tillman's motion for summary judgment for all claims except for the retaliatory failure to promote claim against Turner,

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[2] The Mobile County Personnel Board did not participate in this appeal but is a named party in this action.

Haley, Tillman, and the Mobile County Personnel Board. McCann subsequently consented to summary judgment on this remaining claim, advising the court that she "believe[d] that the Court erroneously dismissed her earlier claims and wishe[d] to proceed with an appeal of that immediately." (*See* Appellant's App., Tabs 80, 82.) On March 26, and April 5, 2007, the district court granted summary judgment on the retaliatory failure to promote claim as to all defendants. (*See id.*, Tabs 81, 83.)

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction over a final judgment of the district court pursuant to 28 U.S.C. § 1291.[3] We review a district court's grant of summary judgment *de novo*. *See Jones v. Dillard's, Inc.*, 331 F.3d 1259,

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[3] Under Article III of the Constitution, federal courts are limited in their jurisdiction to "cases" and "controversies." U.S. Const. art. III, § 2. A case or controversy requires the presence of adverse parties. *See GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, 445 U.S. 375, 382-83, 100 S.Ct. 1194, 63 L.Ed.2d 467 (1980). When "both litigants desire precisely the same result," there is "no case or controversy within the meaning of Art. III of the Constitution." *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48, 91 S.Ct. 1292, 28 L.Ed.2d 590 (1971) (per curiam). Thus, "a party normally has no standing to appeal a judgment to which he or she consented." *Reynolds v. Roberts*, 202 F.3d 1303, 1312 (11th Cir.2000) (brackets and quotations omitted). Because McCann voluntarily consented to summary judgment against her on her retaliatory failure to promote claim against Turner, Haley, Tillman, and the Mobile County Personnel Board, she cannot appeal the dismissal of these claims and, therefore, they are not at issue in this appeal.

1262 (11th Cir.2003). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Eberhardt v. Waters,* 901 F.2d 1578, 1580 (11th Cir.1990) (quoting Fed.R.Civ.P. 56(c)).

DISCUSSION

McCann alleges that she was subject to race discrimination and retaliation, in violation of 42 U.S.C. §§ 1981 and 1983, with respect to matters of employment discipline, compensation, a lowering of service rating, failure to promote, and failure to reassign or transfer, and that she was subject to a hostile work environment.

I. Discrimination

Title VII prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Where, as here, there is no direct evidence of discrimination, a plaintiff may prove discrimination through circumstantial evidence, using the burden-shifting framework established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). To establish a prima facie case for disparate

treatment, McCann must show that "(1) she is a member of a protected class; (2) she was subjected to adverse employment action; (3) her employer treated similarly situated [white] employees more favorably; and (4) she was qualified to do the job." *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1286 (11th Cir.2000). If McCann satisfies these elements, the appellees must provide a legitimate, nondiscriminatory reason for their action. *Burke-Fowler v. Orange County, Fla.*, 447 F.3d 1319, 1323 (11th Cir.2006). If this burden is met, McCann must then prove that the appellees' reasons are a pretext for unlawful discrimination. *Id.*

Only the third element is at issue here. In order to determine whether other employees were similarly situated to McCann, we evaluate "'whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways.'" *Id.* (quoting *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir.1999)). In doing so, "the quantity and quality of the comparator's misconduct [must] be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." *Id.* (quotations omitted); *see also Nix v. WLCY Radio/Rahall Commc'ns*, 738 F.2d 1181, 1185 (11th Cir.1984) ("[T]he misconduct for which [the plaintiff] was discharged [must be] nearly identical to that engaged in by an employee outside

the protected class whom the employer retained.") (brackets and quotations omitted).[4]

McCann alleges that the fifteen day suspension she received after she wore her uniform off-duty was imposed based on race discrimination. McCann claims she was further discriminated against in her compensation because she was not allowed to work

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[4] McCann alleges that she is the only person who was ever disciplined for violating the uniform policy and questions whether the policy was ever disclosed to the officers at the Metro Barracks. Because she is unable to find a "nearly identical" comparator, McCann argues that requiring "identical misconduct would be improperly drawing the circle of comparators too tightly." (Appellant's Br. 16.) McCann advocates for use of the "similar" misconduct standard that has been articulated at times in our past opinions, which requires "similar misconduct from the similarly situated comparator." *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1334 (11th Cir.2000) (quotations omitted); *see also Anderson v. WBMG-42*, 253 F.3d 561, 565 (11th Cir.2001). "Nearly identical," however, does not mean "exactly identical." A range of comparators may satisfy this standard. While we recognize the difficulty McCann may face in meeting this standard, we are bound by precedent to adhere to the "nearly identical standard." *See Burke-Fowler*, 447 F.3d at 1323 n. 2 (finding that the court was required to follow the "nearly identical" standard despite a later panel decision that called this requirement into question, reasoning that "when a later panel decision contradicts an earlier one, the earlier panel decision controls"). Further, there is the possibility that even in the absence of what may fairly be described as a nearly identical comparator, some conduct may be so unfairly discriminatory that no reasonable person would find it non-actionable. That is not the case here and we need not speculate on what such conduct might be. The comparators that McCann presents on appeal must therefore satisfy the "nearly identical" test.

overtime for ninety days as a result of being suspended. Finally, McCann alleges that she was discriminated against because her suspension resulted in her receiving an "unsatisfactory" service rating, which disqualified her from receiving a promotion.

The record demonstrates that McCann failed to establish a prima facie case of discrimination for any of her claims.[5] McCann identifies two comparators to demonstrate that white employees committed similar or more serious offenses and were not similarly disciplined. Neither of these comparators, however, are examples of white employees who violated the uniform directive, or who similarly abused the indicia or privileges of their office, but were not disciplined.

In June 2004, Marnita Coleman, a white inmate work supervisor, was not suspended or formally disciplined after being convicted of disorderly conduct and resisting arrest following a dispute with her daughter-in-law. An Internal Affairs investigation determined that Coleman had engaged in unlawful conduct and conduct unbecoming of an officer. McCann argues that Coleman was charged with the

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[5] The district court determined that McCann's change in shift assignment and denial of request to transfer did not amount to adverse employment actions because she did not demonstrate how either action was "serious and material." *McCann*, 2006 WL 1867486, at *17-18. Because McCann has not advanced arguments relating to this determination on appeal, these alleged acts will not be considered in either her discrimination or retaliation claims.

same offense and that the failure to discipline Coleman is evidence of discrimination.

As the district court correctly found, Coleman's misconduct is not "nearly identical" to McCann's, making Coleman an improper comparator. McCann's conduct occurred in public and while she was in uniform, while Coleman's conduct occurred at a private residence and in plainclothes. McCann directed her conduct at the sheriff of a neighboring county, while Coleman directed her conduct at her daughter-in-law and "only incidentally" at the arresting deputy. Most notably, while McCann invoked her official position in an effort to obtain a personal goal, Coleman did not.

In May 2005, Jonathan Lindsey, a white correctional officer, made vulgar comments and unprofessional statements to a nurse attending an inmate he was escorting. Lindsey received a written reprimand, but was not suspended. As with Coleman, because Lindsey's misconduct is not "nearly identical" to that of McCann, it cannot be used as a comparator. Lindsey was on duty and therefore was not in violation of the uniform directive. Lindsey's conduct was directed toward a civilian and not a high-ranking officer of a neighboring county. Furthermore, Lindsey was not advancing a private agenda in speaking up on behalf of an inmate.

McCann's conduct is qualitatively different from that of the comparators she provided because her conduct involved an abuse of office, while the conduct

of the comparators did not. Consequently, because McCann has not presented proper comparators, she has failed to establish a prima facie case of discrimination with respect to her suspension, and the burden will not be shifted to the appellees to provide a legitimate, nondiscriminatory reason for their actions.

Finally, McCann alleges that she was discriminated against because she was not promoted. As indicated, McCann's failure to earn a promotion is related in part to the suspension she received, which was not an act of actionable discrimination. Further, a prima facie case of discriminatory failure to promote requires a showing that "other equally or less qualified employees who were not members of the protected class were promoted." *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1089 (11th Cir.2004). The only evidence presented by McCann demonstrates that the two candidates promoted were black, and thus, she has failed to meet her burden as to this claim.[6]

Accordingly, the district court properly granted summary judgment on all of McCann's racial discrimination claims.

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[6] Because McCann has not made out a prima facie case of racial discrimination, her argument that pretext can be shown through language demonstrating discriminatory animus will also not be reached.

II. Retaliation

Title VII prohibits an employer from retaliating against an employee "because [s]he has opposed any practice made an unlawful employment practice . . . or because [s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). "To establish a prima facie showing of retaliation under Title VII, the plaintiff must show (1) that she engaged in statutorily protected expression; (2) that she suffered an adverse employment action; and (3) that there is some causal relation between the two events." *Cooper v. Southern Co.,* 390 F.3d 695, 740 (11th Cir.2004) (quotations omitted). As with McCann's discrimination claim, if the appellees articulate legitimate reasons for their actions, McCann must then "show that the employer's proffered reasons for taking the adverse action were actually a pretext for prohibited retaliatory conduct." *Sullivan v. Nat'l R.R. Passenger Corp.,* 170 F.3d 1056, 1059 (11th Cir.1999). In order to do so, McCann must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Cooper,* 390 F.3d at 725 (quotations omitted).

The appellees challenge the third element of McCann's retaliation claim, which requires a plaintiff to demonstrate that "the decision-maker[s] [were] aware of the protected conduct, and that the

protected activity and the adverse action were not wholly unrelated." *Gupta v. Fla. Bd. of Regents,* 212 F.3d 571, 590 (11th Cir.2000) (alterations in original) (quotations omitted); *see also Griffin v. GTE Fla., Inc.,* 182 F.3d 1279, 1284 (11th Cir.1999) ("At a minimum, [a plaintiff] must show that the adverse act followed the protected conduct; this minimum proof stems from the important requirement that the employer was actually aware of the protected expression at the time it took adverse employment action.") (quotations omitted). We have found that "'close temporal proximity' may be sufficient to show that the protected activity and the adverse action were not 'wholly unrelated.'" *Gupta,* 212 F.3d at 590 (quoting *Farley v. Nationwide Mut. Ins. Co.,* 197 F.3d 1322, 1337 (11th Cir.1999)).

McCann alleges that she suffered retaliation after filing a written grievance on July 14, 2004, protesting her suspension. She alleges that Bounds retaliated against her by sending out a memorandum on July 19, 2004, advising McCann's supervisors that suspended officers were not permitted to work overtime, which affected her compensation. Bounds was listed as a recipient on McCann's grievance and appellees never stated that Bounds did not receive it at approximately the time it was sent. Thus, the five days between McCann's grievance and Bounds' overtime memorandum satisfies the "close temporal proximity" test of the causation element. *See McCann,* 2006 WL 1867486, at *7.

Bounds articulated a nondiscriminatory reason for her memorandum, explaining that employees who are suspended should not be able to recover for their unpaid leave by working overtime upon their return to work. McCann attempts to show pretext by alleging that employees of no other department of the Sheriff's Office were forbidden from working overtime. The district court noted, however, that although a departmental policy had not been implemented, Bounds' superiors had previously discussed instituting this policy, but could not do so because of staffing shortages. According to at least one superior, Bounds' directive was consistent with their previous conclusion that this policy would be appropriate.

The policy, which was agreed upon prior to the grievance, is entirely logical, as it ensures the suspension will have its intended effect. McCann therefore has failed to show a genuine issue of material fact that Bounds' legitimate reason for her employment decision was pretextual. *See, e.g., Wascura-v. City of S. Miami,* 257 F.3d 1238, 1247 (11th Cir.2001) (affirming summary judgment for employer where legitimate reasons for the termination decision were offered by the defendant and employee presented virtually no evidence, other than temporal proximity of the events); *Gupta,* 212 F.3d at 590-91 (finding that although there was close temporal proximity between the adverse employment action and the protected activity, employee failed to create a genuine issue of

material fact that the employer's nondiscriminatory reasons for its action were pretextual).[7]

McCann also alleges that she received an unsatisfactory service rating that prevented her promotion.[8] McCann's service rating is dated August 24, 2004, which is approximately six weeks after she filed her grievance as to the suspension. As indicated, Bounds was an included recipient on McCann's grievance and no argument has been raised that she did not receive it timely. The six weeks between McCann's grievance and the service rating arguably satisfies the proximity requirement. *See, e.g., Farley,* 197 F.3d at 1337 (time frame of seven weeks sufficiently proximate when employers aware of plaintiff's EEOC charge shortly after its filing); *Donnellon v. Fruehauf Corp.,* 794 F.2d 598, 601 (11th Cir.1986) ("The short period of time [one month] between the filing of the discrimination complaint and the [adverse employment action] belies any assertion by the

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[7] Moreover, the district court noted that McCann provided no explanation for why Bounds would have been motivated to retaliate against her, as Bounds' only involvement in the imposition of the suspension was to testify about the uniform directive. *See McCann,* 2006 WL 1867486, at *8.

[8] The district court determined that McCann's two acts of alleged opposition to perceived race discrimination that occurred before her suspension, her filing of a Title VII lawsuit in 1999 and her submission of an officer narrative form on February 18, 2004, occurred too long before her suspension to support an inference of causation. *McCann,* 2006 WL 1867486, at *6. Because McCann has not advanced arguments relating to these acts on appeal, they will not be considered.

defendant that the plaintiff failed to prove causation.")

Bounds' proffered reasons for the low service rating included McCann's chronic tardiness, her manner of requesting leave by calling in, and her suspension. McCann alleges that these reasons are a pretext for unlawful retaliation because she has always received satisfactory service ratings before and has been commended by other officers on her work performance, other officers had less leave remaining than McCann, her suspension was due to off-duty conduct and unrelated to her job performance, and her supervisor Sergeant Taylor apologized for giving her a low service rating.

McCann has failed to demonstrate that Bounds' reasons for taking the adverse action were pretextual. As the district court properly found, "[t]he satisfactory ratings of previous supervisors can be of no consequence without a showing that, when under their supervision, the plaintiff had leave and tardiness issues similar to those noted by Bounds." *McCann,* 2006 WL 1867486, at *10. Significantly, "differences in the evaluation of [a plaintiff's] performance do not establish a genuine issue on pretext. Different supervisors may insist upon different standards of behavior, and a new supervisor may decide to enforce policies that a previous supervisor did not consider important." *Rojas v. Florida,* 285 F.3d 1339, 1343 (11th Cir.2002). Thus, the opinions of former supervisors and co-workers that do not

address McCann's leave and tardiness issues cannot demonstrate pretext.[9]

McCann's attempts to show pretext by providing the leave balances of other officers and by claiming that her suspension was unrelated to job performance are misguided. McCann was not rated unsatisfactorily for a low leave balance, but rather for the manner in which she requested leave. McCann also has provided no evidence that her suspension for off-duty conduct cannot be considered in evaluating an officer's service rating, particularly when the suspension was for abuse of office. In fact, the Sheriff's Office issued a standard operating procedure explicitly stating that "it is incumbent upon each member and employee to be continuously on guard against any manner of unbecoming conduct or unprofessional behavior" and that "[c]onduct or deportment that is determined to be prejudicial to the good order, efficiency and discipline of the Mobile County Sheriff's Office (MCSO) may subject the offender to disciplinary action." (Appellant's App., Tab 82 at 1.)

Finally, McCann alleges that she was retaliated against when she was denied a promotion. McCann voluntarily consented to summary judgment on this claim against all of the defendants except Bounds.

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[9] This reasoning also applies to McCann's claim that Sergeant Taylor apologized for giving her a low service rating, as supervisors vary in their opinions as to what constitutes satisfactory employee performance.

See supra note 2 and accompanying text. As McCann has not argued or presented any evidence that Bounds was connected to the promotion decision, except in relation to the service rating, and the service rating has not been shown to be the result of actionable discrimination, summary judgment was correctly granted against McCann as to the retaliatory failure to promote claim against Bounds.

Accordingly, McCann has failed to meet her burden to demonstrate that her employers' reasons for their actions as to overtime, performance rating and promotion were actually a pretext for retaliatory conduct. The district court properly granted summary judgment on McCann's retaliation claims.

III. Hostile Work Environment

Title VII prohibits a hostile work environment in which "a series of separate acts . . . collectively constitute one 'unlawful employment practice.'" *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (citing 42 U.S.C. § 2000e-5(e)(1)). As opposed to "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire," a hostile work environment claim addresses acts "different in kind" whose "very nature involves repeated conduct," such as "'discriminatory intimidation, ridicule, and insult.'" *Id.* at 114-16, 122 S.Ct. 2061 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)).

Thus, these "claims are based on the cumulative effect of individual acts." *Id.* at 115, 122 S.Ct. 2061.

To establish a hostile work environment claim, McCann must show: "(1) that [s]he belongs to a protected group; (2) that [s]he has been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee . . . ; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or of direct liability." *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir.2002). Determining whether the harassment was sufficiently severe or pervasive involves "both an objective and subjective component." *Id.* at 1276. In determining the objective element, a court looks to "'all the circumstances,' including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Morgan*, 536 U.S. at 116, 122 S.Ct. 2061 (quoting *Harris*, 510 U.S. at 23, 114 S.Ct. 367); *see also Miller*, 277 F.3d at 1275.

McCann alleges she was subject to a hostile work environment where white employees made derogatory racial comments about blacks, harsher discipline was received by black employees, and complaints of discrimination were subject to retaliation and not

investigated. According to McCann, however, the only racially insensitive comments she heard between 2003 and 2005 were when Bounds called her "girl" and called two male black employees "boys." McCann also alleges that, at some time prior to 2003, out of McCann's hearing, Tillman referred to a former black employee as a "nigger bitch" and declared that "he had never received the 'nigger vote' and that he didn't want it."[10] (Appellant's Br. 33-34.)

As the district court properly found, the remainder of McCann's allegations concern "patterns of discrimination practiced against black employees," which constitute discrete acts that must be challenged as separate statutory discrimination and retaliation claims. *McCann,* 2006 WL 1867486, at *19-20; *see also Morgan,* 536 U.S. at 111-13, 122 S.Ct. 2061. These cannot be brought under a hostile work environment claim that centers on "discriminatory intimidation, ridicule, and insult." *See Morgan,* 536 U.S. at 116, 122 S.Ct. 2061 (quotations omitted).

Although offensive, such instances of racially derogatory language alone, extending over a period of

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[10] Although these offensive statements occurred outside the statutory time period, as long as "an act contributing to the [hostile work environment] claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." *Morgan,* 536 U.S. at 117, 122 S.Ct. 2061. Thus, "[i]t does not matter . . . that some of the component acts of the hostile work environment fall outside the statutory time period." *Id.*

more than two years, are too sporadic and isolated to establish that her employers' conduct was so objectively severe or pervasive as to alter the terms and conditions of her employment. As the district court properly found, the only term ever directed at McCann was "girl" and the term "boy" was used only once in front of her. *McCann,* 2006 WL 1867486, at *20. McCann does not allege that anyone else ever used racially derogatory speech towards her. Although McCann heard of racial epithets being spoken twice by Sheriff Tillman, these were never directed at McCann, nor spoken in her presence. *Id.*; *see also Harris,* 510 U.S. at 21, 114 S.Ct. 367 (finding that the "'mere utterance of an . . . epithet which engenders offensive feelings in a employee,' . . . does not sufficiently affect the conditions of employment to implicate Title VII") (quoting *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)). Moreover, although McCann alleges that she was upset by this language, she has not demonstrated that the alleged environment interfered with her job performance. In fact, McCann actually testified that it did not affect her work. (*See* Appellant's App., Tab 1 at 33.)

Consequently, the evidence presented by McCann was insufficient to support a claim of hostile work environment, and the district court properly granted summary judgment with respect to this claim.

CONCLUSION

Accordingly, we affirm the district court's grant of summary judgment as to all claims.

United States District Court, S.D. Alabama, Southern Division.

Georgia McCANN, Plaintiff,

v.

MOBILE COUNTY PERSONNEL BOARD, et al., Defendants.

Civil Action No. 05-0364-WS-B.

July 6, 2006.

Jerry D. Roberson, Roberson & Roberson, Birmingham, AL, for Plaintiff.

K. Paul Carbo, Jr., Jacqueline M. McConaha, The Atchison Firm, Mobile, AL, for Defendants.

ORDER

WILLIAM H. STEELE, District Judge.

This matter is before the Court on motions for summary judgment filed by all defendants. (Docs.34, 42). The parties have filed briefs and evidentiary materials in support of their respective positions, (Docs.33, 38-41), and the motions are ripe for resolution. After carefully considering the foregoing, the Court concludes that the motions for summary judgment are due to be granted in part and denied in part.

BACKGROUND

The plaintiff has at all relevant times been a corrections officer employed by the Mobile County Sheriff's Office. Defendant Jack Tillman, a white male, served at all relevant times as sheriff of Mobile County. Defendant Michael Haley, a white male, has served as warden of the Mobile County jail since April 2003. Defendant David Turner, a white male, has served as deputy warden of the Mobile County jail since September 2003. Defendant Melinda Bounds, a white female, served at all relevant times as a lieutenant and was, from June 2003 to September 2005, the plaintiff's supervisor.[1]

Tillman is sued only in his official capacity as the plaintiff's employer for purposes of her claims under Title VII, 42 U.S.C. §§ 1981 and 1983. The other individual defendants are sued in both their individual and official capacities under Sections 1981 and 1983. The Mobile County Personnel Board ("the Board") is sued under Sections 1981 and 1983 for injunctive relief only.

The complaint alleges that the plaintiff has experienced race discrimination and retaliation in violation of these statutes in the following respects:

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[1] The complaint identifies this individual as "Melissa" Bounds, but she identifies herself as "Melinda." (Doc. 40, Exhibit 94 at 142-43).

Discipline, (Doc. 1, ¶¶ 5-7, 11-13);

Compensation, (*id.*, ¶ 11);

Lowering of service rating, (*id.*, ¶ 13);

Failure to promote, (*id.*, ¶¶ 5-7, 11, 13);

Failure to reassign or transfer, (*id.*, ¶¶ 5-7, 11, 13); and

Hostile work environment, (*id.*, ¶ 8).

CONCLUSIONS OF LAW

The Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) and 42 U.S.C. § 2000e-5(f)(3). Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) and 42 U.S.C. § 2000e-5(f)(3).

Summary judgment should be granted only if "there is no issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party seeking summary judgment bears 'the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir.1991). Once the moving party has satisfied its responsibility, the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact. *Id.* "If the nonmoving party fails to make 'a sufficient showing on an essential element of her case with respect to which she has the burden of proof,' the moving party

is entitled to summary judgment." *Id.* (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986)) (footnote omitted).

The parties have submitted a large number of exhibits, some of which they have not referred to in their briefs and some of which they have referred to only in part. There is no burden on the Court to identify unreferenced evidence supporting a party's position.[2] Similarly, "[t]here is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment." *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir.1995). Accordingly, the Court's review is limited to those portions of the exhibits to which the parties have specifically cited. The Court's review is similarly limited to those legal arguments the parties have expressly advanced.

Because the plaintiff does not rely on direct evidence of discrimination, the shifting burden appropriate for cases resting on circumstantial evidence applies. In Title VII cases alleging discrimination, the burden is first on the plaintiff to establish a prima

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[2] *E.g., Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir.1998) ("The district court has discretion to go beyond the referenced portions of these [summary judgment] materials, but is not required to do so."); *accord Jones v. Sheehan, Young & Culp, P. C.*, 82 F.3d 1334, 1338 (5th Cir.1996); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir.1989); *Lawson v. Sheriff of Tippecanoe County,* 725 F.2d 1136, 1139 (7th Cir.1984); *Karlozian v. Clovis Unified School District,* 2001 WL 488880 at *1 (9th Cir.2001); *see also* Local Rule 7.2.

facie case. If she succeeds, the employer must meet its burden of producing evidence of one or more legitimate, nondiscriminatory reasons for the adverse employment action. The burden then shifts back to the plaintiff to show that the employer's proffered reasons are a mere pretext for illegal discrimination. *E.g., Scott v. Suncoast Beverage Sales, Ltd.,* 295 F.3d 1223, 1228 (11th Cir.2002). The same burden-shifting paradigm applies to cases alleging retaliation under Title VII. *Sullivan v. National Railroad Passenger Corp.,* 170 F.3d 1056, 1059 (11th Cir.1999).

The parties agree that "claims under § 1983 and Title VII generally have the same elements of proof and use the same analytical framework. . . . " *Pennington v. City of Huntsville,* 261 F.3d 1262, 1265 (11th Cir.2001). (Doc. 33 at 8; Doc. 38 at 7). The same is true of claims under Section 1981. *Standard v. A.B.E.L. Services, Inc.,* 161 F.3d 1318, 1330 (11th Cir.1998).

I. Discipline.

On July 12, 2004, a pre-disciplinary panel found the plaintiff guilty of two specifications of conduct unbecoming an officer, one specification of disorderly conduct, and one specification of violation of a lawful or reasonable regulation or order made and given by a superior officer. (Doc. 40, Exhibit 51 at 1-5). All charges and specifications arose out of an incident occurring on or about June 1, 2004 and involving the plaintiff's interaction with representatives of the

Washington County sheriff's office. As a sanction, the plaintiff was suspended without pay for ten days beginning July 18, 2004.

A. Race Discrimination.

Before work on June 1, 2004, the plaintiff learned that her son was in jail in Washington County. (Doc. 40, Exhibit 93 at 20-21). She called her sergeant, requested and received an emergency vacation day, and proceeded to the Washington County jail without changing out of her uniform. (*Id.*; *id.*, Exhibit 94 at 122, 130). Turner had issued a directive in November 2003 forbidding employees to wear uniforms other than at work or when traveling to and from work. (*Id.*, Exhibit 32). On June 4, 2004, Sheriff Wheat of Washington County wrote the Mobile County sheriff's department that the plaintiff had behaved irrationally and disrespectfully to Wheat and his deputies, including making false accusations about the deputies and how they performed their work. (McCann Deposition, Exhibit 2).

The pre-disciplinary panel found the plaintiff guilty of wearing her uniform at the Washington County sheriff's office in violation of Turner's directive; of wearing her uniform in an attempt to influence the bonding and release of her son; and of being discourteous and irrational in her dealings with Sheriff Wheat. (Doc. 40, Exhibit 51 at 1-3). The plaintiff appealed to the Board, which heard testimony from a wealth of witnesses and found the

plaintiff "guilty of the charges brought against her." (*Id.* at 5-16).

The plaintiff admits that she attended to personal business while in uniform, but she denies being disrespectful to law enforcement officials in Washington County and denies having used her uniform to attain a personal goal. She does not appear to contest that Turner issued the uniform directive, but she denies that it was properly publicized or that she was aware of its existence. (Doc. 33 at 10-14). The plaintiff presented evidence in support of these arguments at her pre-disciplinary hearing and before the Board, but both bodies rejected them in finding her guilty as set forth above. The panel consisted of three officers, none of whom is alleged to have harbored a discriminatory motive. Likewise, the Board consists of five members, none of whom is alleged to have discriminated against the plaintiff.[3]

"To establish discrimination in discipline, . . . a plaintiff must first make out a prima facie case demonstrating: 1) that he belongs to a protected class

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[3] The evidence presented to the Board demonstrates overwhelmingly that the plaintiff was irrational and discourteous, and it strongly supports the proposition that she wore her uniform in an effort to influence the bonding and release of her son. The evidence was more evenly divided concerning the plaintiff's awareness of the directive but was more than strong enough to support the Board's finding – especially given her otherwise inexplicable resistance to being photographed in uniform by the bonding company and attempts to disguise her uniform in the picture. (Doc. 40, Exhibit 51 at 8).

under Title VII; 2) that he was qualified for the job; and 3) that a similarly situated employee engaged in the same or similar misconduct but did not receive similar discipline." *Alexander v. Fulton County,* 207 F.3d 1303, 1336 (11th Cir.2000); *accord Lathem v. Department of Children and Youth Services,* 172 F.3d 786, 792 (11th Cir.1999). The plaintiff concedes her obligation to satisfy these elements, (Doc. 33 at 15), only the last of which is challenged by the defendants.[4]

"When a plaintiff alleges discriminatory discipline, to determine whether employees are similarly situated, . . . we require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." *Burke-Fowler v. Orange County,* 447 F.3d 1319, 1323 (11th Cir.2006). *Burke-Fowler* invoked the "prior panel precedent" rule to select the "nearly identical" standard rather than the seemingly lower, "similar" standard articulated in some Eleventh Circuit opinions and proposed by the plaintiff here. *Id.* at 1323 n. 2.[5]

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[4] To establish a prima facie case, the discipline must be of sufficient magnitude to constitute an adverse employment action. *E.g., Burke-Fowler v. Orange County,* 447 F.2d 1319, 1322 (11th Cir.2006). The defendants do not question that the plaintiff's ten-day suspension satisfies this element of her prima facie case.

[5] The *Burke-Fowler* Court traced the "nearly identical" standard to *Nix v. WLCY Radio/Rahall Communications,* 738 F.2d 1181, 1185 (11th Cir.1984). The same requirement can be

(Continued on following page)

The plaintiff relies on two comparators, neither of whom satisfies the "nearly identical" test.[6]

Marnita Coleman, an inmate work supervisor, was charged with disorderly conduct and resisting arrest in June 2004 and was thereafter convicted. (Doc. 40, Exhibit 76). When deputies responded to a domestic dispute involving Coleman's son and daughter-in-law, they instructed Coleman to stay away from the daughter-in-law. Coleman initially complied but then returned to retrieve a house key, leading to a verbal altercation with her relative. Coleman ignored several orders from a deputy to back away and was arrested for disorderly conduct. She then tried to avoid being handcuffed and refused to enter the patrol car. (*Id.*, Exhibit 81). An Internal Affairs investigation concluded that Coleman had violated departmental rules governing conduct unbecoming an officer and engaging in unlawful conduct. (*Id.*).

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found as early as 1982, when the old Fifth Circuit declared that the plaintiff's "burden . . . was to establish that the misconduct for which she was discharged was nearly identical to that engaged in by a male employee whom [the defendant] retained." *Davin v. Delta Air Lines, Inc.*, 668 F.2d 567, 570 (5th Cir.1982). These pronouncements, especially in *Davin*, appear to be holding. Even if some lower standard in fact predates the "nearly identical" standard (and the plaintiff has not attempted to show this), *Burke-Fowler* resolved the intra-circuit conflict, and its ruling is binding on this Court.

[6] The plaintiff complains generally that no other employee has been suspended for violating the uniform directive. (Doc. 33 at 17). Absent a showing that any other employee has violated the directive, however, she lacks a comparator.

There are several critical differences between Coleman's situation and the plaintiff's. First, while the plaintiff's conduct occurred in a public place, Coleman's occurred at and adjacent to her residence. Second, while the plaintiff's conduct occurred while she was in uniform, Coleman was not in uniform. Third, while the plaintiff's conduct was directed towards the sheriff of a neighboring county, Coleman's conduct was directed towards her daughter-in-law (disorderly conduct) and only incidentally at the arresting deputy (resisting arrest). Fourth, while the plaintiff's conduct invoked her official position in an effort to attain a personal goal, Coleman's did not. In the face of these glaring differences, the mere fact that both employees engaged in conduct unbecoming an officer cannot render them similarly situated under the governing "nearly identical" standard.

In May 2005, corrections officer Jonathan Lindsey was reprimanded for conduct unbecoming an officer. Lindsey transported an inmate to a Mobile hospital and there used vulgar language and made unprofessional statements to a nurse he considered to be unprofessional in her handling of the inmate. (Doc. 40, Exhibit 16). Although a closer case than Coleman's, "the quantity and quality of [Lindsey's] misconduct [is not] nearly identical" to that of the plaintiff. First, Lindsey's conduct was not directed towards a high-ranking official of a neighboring county but towards a civilian. Second, Lindsey was not attempting to advance a private agenda but to safeguard the dignity of an inmate under his care.

Third, because Lindsey was on duty, he was not in violation of any rule governing the wearing of uniforms.

The "nearly identical" standard is stringent, and differences smaller than those present here have been held sufficient under this standard to preclude reliance on a proposed comparator. For example, in *Burke-Fowler* the plaintiff had casual conversation with an inmate and, after he was transferred to another facility, began a romantic relationship with him culminating in marriage. The plaintiff was terminated for violating her employer's anti-fraternization policy, which forbade employees to "fraternize with[,] correspond, call or receive phone calls from inmates." The Court held that other employees who had romantic relationships with inmates were not similarly situated because the relationships began before the inmates' incarceration. 447 F.3d at 1321-25.

Unable to establish a prima facie case under the "nearly identical" standard, the plaintiff resists its application. She first complains that the test could lead to the absurd result of a comparator being ruled not similarly situated because his conduct, although objectively much more serious than that of a plaintiff, was – precisely because it was so much worse – not nearly identical to the less serious conduct of the plaintiff. Thus, she says, the test should be one of "comparable seriousness." (Doc. 33 at 16-17). The plaintiff's hypothetical does suggest a curious result in certain situations, and it might persuade the

Eleventh Circuit to clarify that the "nearly identical" standard restricts the range of comparators only on the low side.[7] It does not, however, authorize this Court to ignore that standard, especially in a case such as this, where the plaintiff's conduct plainly is more serious than that of her comparators.

Next, the plaintiff suggests that she "may also satisfy the fourth element of the prima facie case by showing a differential application of work rules." (Doc. 33 at 16). This is not, however, an alternate means of establishing a prima facie case but merely an alternate way of expressing the "similarly situated" requirement. *See Lathem v. Department of Children and Youth Services,* 172 F.3d at 793 ("If two employees are not 'similarly situated,' the different application of workplace rules does not constitute illegal discrimination.").

Finally, the plaintiff argues that she can establish a prima facie case without reference to comparators by demonstrating that she did not actually commit the infractions made the basis of her discipline. (Doc. 33 at 17). The plaintiff relies for this

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[7] The use of the term "comparable seriousness" in past Supreme Court and Eleventh Circuit cases may augur well for such a development. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 804 (1973); *Anderson v. WBMG-42,* 253 F.3d 561, 565 n. 2 (11th Cir. 2001); *Holifield v. Reno,* 115 F.3d 1555, 1563 (11th Cir. 1997); *Jones v. Gerwens,* 874 F.2d 1534, 1541 n. 12 (11th Cir. 1989).

proposition on *Jones v. Gerwens,* 874 F.2d 1534 (11th Cir.1989). *Jones* reads in pertinent part as follows:

> Accordingly, we hold that, in cases involving alleged racial bias in the application of discipline for violation of work rules, the plaintiff, in addition to being a member of a protected class, must show either (a) that he did not violate the work rule, or (b) that he engaged in misconduct similar to that of a person outside the protected class, and that the disciplinary measures enforced against him were more severe than those enforced against the other persons who engaged in similar misconduct.

Id. at 1540. As the Eleventh Circuit has parsed this language, the phrase following the final comma applies to both subsections (a) and (b). *Jones v. Bessemer Carraway Medical Center,* 137 F.3d 1306, 1311 n. 6 (11th Cir.), superseded in unrelated part, 151 F.3d 1321 (11th Cir.1998). Thus, "[w]e stress that, under the *Jones* formulation, no plaintiff can make out a prima facie case by showing just that she belongs to a protected class and that she did not violate her employer's work rule. The plaintiff must also point to someone similarly situated (but outside the protected class) who disputed a violation of the rule and who was, in fact, treated better." *Id.*

Because the defendants have challenged the plaintiff's ability to establish a prima facie case and she has failed to identify any means of doing so, they are entitled to summary judgment as to this claim.

B. Retaliation.

"To establish a prima facie showing of retaliation under Title VII, the plaintiff must show (1) that she engaged in statutorily protected expression; (2) that she suffered an adverse employment action; and (3) that there is some causal relation between the two events." *Cooper v. Southern Co.,* 390 F.3d 695, 740 (11th Cir.2004). The defendants challenge the plaintiff's ability to establish the third element. (Doc. 33 at 18-19).

"To establish a causal connection, a plaintiff must show that the decision-maker[s] [were] aware of the protected conduct, and that the protected activity and the adverse action were not wholly unrelated." *Gupta v. Florida Board of Regents,* 212 F.3d 571, 590 (11th Cir.2000) (internal quotes omitted)."For purposes of a prima facie case, 'close temporal proximity' may be sufficient to show that the protected activity and the adverse action were not 'wholly unrelated.'" *Id.*

The plaintiff has identified only two acts of alleged opposition to perceived race discrimination occurring before her suspension was announced on July 12, 2004: (1) her filing of a Title VII lawsuit in 1999, concluding with a motion to enforce settlement on October 3, 2003, (Doc. 40, Exhibit 57); and (2) her submission of an officer narrative form on February 18, 2004, (*id.*, Exhibit 71). (Doc. 38 at 5, 9-10). As the defendants point out, the five-month period between the plaintiff's narrative and her suspension is, as a matter of law, too long to support an inference of

causation.[8] The nine months between the conclusion of the plaintiff's prior lawsuit and her suspension is thus necessarily too long as well.

The plaintiff does not counter the defendants' argument or articulate any alternative basis for meeting the causation requirement. Indeed, she does not address the retaliation prong of her discipline claim at all. What she does do is insinuate that she engaged in additional protected activity, but without providing any record evidence of the occurrence or timing of such activity. (Doc. 38 at 10). Such unsupported conclusions are patently insufficient to carry her burden.

Because the defendants have pointed out the plaintiff's inability to establish a prima facie case and she has failed to identify any means of doing so, they are entitled to summary judgment as to this claim.

II. Compensation.

The plaintiff's only compensation claim concerns the assignment of overtime. On July 19, 2004,

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[8] *See Higdon v. Jackson*, 393 F.3d 1211, 1221 (11th Cir.2004) ("By itself, the three month period between [the protected expression and the adverse action] does not allow a reasonable inference of a causal relation between the protected expression and the adverse action."); *accord Wascura v. City of South Miami*, 257 F.3d 1238, 1248 (11th Cir.2001) (gap of four months too long to constitute close temporal proximity).

Bounds sent a memorandum to her four sergeants advising them that officers and staff suspended without pay after a disciplinary hearing would be ineligible for overtime for 90 days after returning to work, with subsequent overtime requiring Bounds' approval. (Doc. 40, Exhibit 23).

A. Race Discrimination.

The defendants insist that the plaintiff experienced no adverse employment action because, after Hurricane Ivan struck in September 2004, the plaintiff was assigned overtime. (Doc. 41 at 8). There is no question but that an exclusion from overtime opportunities constitutes an adverse employment action,[9] and the mere happenstance that a natural disaster causes the employer to prematurely rescind the exclusion cannot retroactively erase the adverse action for the two months the exclusion was in place.

Bounds' articulated reason for sending the memorandum is that, pursuant to a discussion with Haley or Turner, she understood that employees disciplined with time off without pay should not be

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[9] *Bass v. Board of County Commissioners*, 256 F.3d 1095, 1118 (11th Cir.2001) ("We conclude that the [defendant's] actions which deprived [the plaintiff] of compensation which he otherwise would have earned [including having "denied him the opportunity to earn overtime pay"] clearly constitute adverse employment actions for purposes of Title VII."); *accord Shannon v. BellSouth Telecommunications, Inc.*, 292 F.3d 712, 716 (11th Cir.2002).

able to recoup their losses by working overtime. (Bounds Deposition at 50). Because the plaintiff does not assert that this reason is insufficient to meet the defendants' burden, she must demonstrate the existence of a genuine issue of material fact as to whether Bounds' reason is a pretext for unlawful discrimination.

The plaintiff insists that Bounds' directive is racially discriminatory, (Doc. 33 at 23), but she fails to explain how. On its face, the memorandum applies to all uniformed and civilian employees under Bounds' authority, regardless of race, and the plaintiff has not suggested that it would not be applied to any white employee receiving time off without pay. For all that appears, the memorandum was not issued earlier only because there was no employee as to whom it could be applied. The mere fact that, at the moment it was issued, the memorandum captured only the plaintiff is not evidence that it was intended to discriminate against blacks.

As the plaintiff acknowledges, (Doc. 33 at 6), "[t]o show that the employer's reasons were pretextual, the plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Cooper v. Southern Co.*, 390 F.3d at 725. The plaintiff having failed utterly to meet or even address this burden, the defendants are entitled to summary judgment as to this claim.

B. Retaliation.

On July 14, 2004, the plaintiff prepared a document grieving her suspension. (Doc. 40, Exhibit 72). The memorandum is addressed to, inter alia, Bounds, and the defendants make no argument that she did not receive it on or shortly after July 14. Bounds' overtime memorandum, dated only five days later, plainly satisfies the causation element of the plaintiff's prima facie case under the "close temporal proximity" test.

The grievance lists the plaintiff's objections to the procedures employed and identifies gaps in the evidence against her. In the concluding paragraph, the plaintiff states that "I feel as if this was a discriminating act against [me]. I also feel as if this is retaliation against [me]." (Doc. 40, Exhibit 72 at 2). The defendants argue that this language does not constitute statutorily protected opposition but only the "invoking [of] magic words in an otherwise standard grievance." (Doc. 33 at 7). The defendants offer no authority or argument in support of their ipse dixit, and the Court will not supply the deficiency.

As noted, Bounds' articulated legitimate reason for issuing the memorandum was her understanding that employees disciplined with unpaid leave should not be allowed to recoup their losses by working overtime upon their return. In her only effort to show pretext, the plaintiff stresses that Bounds' superiors had considered creating a departmental policy along the lines of her directive but had not done so. (Doc. 38

at 23). The only evidence, however, is that although her superiors did not implement a departmental policy, they had expressed to Bounds and other lieutenants their agreement with this philosophy, and they withheld establishing a mandatory, department-wide policy only because staffing shortages would have made it difficult to implement. (Haley Deposition at 93, 95; Turner Deposition at 62-63, 66). Bounds' adoption of this position for her employees was both consistent with her superiors' philosophy and within her authority, (Haley Deposition at 85-86, 94-95), and such policies are not uncommon in law enforcement. (Barlow Deposition at 37). In short, there is no suspicious tension between Bounds' adoption of this policy for her employees and her superiors' failure to adopt the same policy for the department as a whole.

The plaintiff is thus left to base her retaliation claim exclusively on the timing of the memorandum in relation to her grievance. However, "temporal proximity . . . alone is not sufficient to establish pretext," *Spann v. DynCorp Technical Services, LLC,* 2006 WL 1667294 at *3 (11th Cir.2006), at least "[w]here the employer produces significant evidence of the employee's poor performance" or other legitimate reason for the employment decision. *Gamba v. City of Sunrise,* 157 Fed. Appx. 112, 113 (11th Cir.2005) (FMLA case). As noted above, Bounds' articulated reason is perfectly consistent with her superiors' known preference for preventing disciplined employees from making up lost earnings

imposed as a sanction, with the approval of such policies within the law enforcement community generally, and with her authority to manage manpower needs within the barracks. Given the strength of the defendants' uncontroverted evidence, close temporal proximity cannot create a jury issue as to pretext.

The correctness of this result is only underscored by the plaintiff's failure to offer any explanation why Bounds would desire to punish her for claiming that her suspension was motivated by discrimination or retaliation. Bounds' only connection with the proceedings was to testify as to the publicity given the uniform directive, (Doc. 40, Exhibit 51 at 9-10), and the plaintiff's grievance expresses no dissatisfaction with Bounds' testimony or that of any other witness. (*Id.*, Exhibit 72). Nor has the plaintiff argued or produced evidence that Bounds acted at the urging of Tillman, Haley, Turner or anyone else who might have had a retaliatory motive.

Because the plaintiff has not demonstrated the existence of a genuine issue of material fact as to pretext, the defendants are entitled to summary judgment as to this claim.

III. Service Rating.

On or about August 24, 2004, the plaintiff received an annual service rating of "unsatisfactory" from defendant Bounds. (Turner Deposition, Exhibit 49). The defendants admit that the unsatisfactory

rating constituted an adverse employment action because it temporarily disqualified the plaintiff from promotion. (Doc. 41 at 7).

A. Race Discrimination.

The defendant argues that the plaintiff cannot establish a prima facie case for want of a similarly situated comparator. (Doc. 33 at 23). The plaintiff acknowledges that she must identify such a comparator to survive summary judgment, (Doc. 38 at 5-6), and she attempts, unsuccessfully, to do so.

Bounds provided two reasons for giving the plaintiff an unsatisfactory rating: (1) that she "takes time off from work by calling in and requesting time off and has a pattern of reporting late for work"; and (2) her suspension. (Doc. 40, Exhibit 34). With respect to the former, the plaintiff asserts that "many officers [under Bounds' supervision] had as little or less leave than McCann." (Doc. 38 at 19). The documents on which she relies are not relevant to her point, since they reflect balances almost a year following the August 2004 rating. (Doc. 40, Exhibit 64).

More fundamentally, the plaintiff's argument misconstrues Bounds' reason for the low service rating. *Cf. Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1088 (11th Cir.2004) ("If the proffered reason is one that might motivate a reasonable employer, a plaintiff cannot recast the reason but must meet it head on and rebut it."). Bounds did not accuse the plaintiff of using too much leave, or of using more

than she had accumulated; rather, Bounds faulted the plaintiff for her irresponsible manner of taking time off. First, the plaintiff repeatedly sought time off remotely, by telephone, rather than by advance personal request. Second, the plaintiff habitually reported for duty after her scheduled start time. The plaintiff has not even attempted to identify another employee with similar issues who was not dealt with similarly.

With respect to Bounds' reliance on her suspension, the plaintiff identifies Andre King as having received a satisfactory service rating following a 30-day suspension. (Doc. 38 at 21). King, however, is black, (*id.*), and so is not a person outside the plaintiff's protected category.[10] The plaintiff's only other comparator is Marnita Coleman. (*Id.*). Since she was not suspended, she cannot serve as a comparator to the plaintiff, who was. Looking past the discipline imposed to the underlying conduct, and as discussed in Part I.A, Coleman is not similarly situated to the plaintiff.

The plaintiff's inability to identify a similarly situated comparator precludes her from establishing a prima facie case under the only formulation she or the defendants have urged upon the Court, and the

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[10] Nor has the plaintiff, who has provided King's service rating reports for several years, (Doc. 40, Exhibit 78), identified any evidence for the proposition that King had been suspended during any of these review periods.

defendants are entitled to summary judgment as to this claim.

B. Retaliation.

The plaintiff's only statement in support of this claim is that her unsatisfactory service rating "was clearly an effort to punish [her] for being an outspoken advocate for herself and other victims of discrimination." (Doc. 38 at 21). As discussed in Part I.B, the plaintiff has provided no record evidence of any potentially protected expressions preceding her July 2004 suspension other than her prior lawsuit and her officer narrative form. The single additional expression that occurred between the suspension and the service rating was the plaintiff's grievance of her suspension. (Doc. 40, Exhibit 72).

The defendants first challenge the plaintiff's ability to establish the causation element of her prima facie case. (Doc. 33 at 23). As discussed in Part I.B, the prior lawsuit and the officer narrative form are too remote to support causation based on timing alone. The grievance, however, is dated July 14, 2004, six weeks before Bounds' August 24 service rating, and its identification of Bounds as a recipient constitutes evidence that Bounds received the grievance on or shortly after that date. The defendants have not argued otherwise. Nor have they identified any authority for the proposition that six weeks is too long a gap to satisfy the causation element, and Eleventh Circuit precedent suggests the contrary. *See*

Farley v. Nationwide Mutual Insurance Co., 197 F.3d 1322, 1337 (11th Cir.1999) (where the plaintiff was fired seven weeks after filing an EEOC charge and there was evidence the decision makers were aware of the charge "shortly after its filing," "this timeframe [was] sufficiently proximate to create a causal nexus for purposes of establishing a prima facie case").

The defendants' articulated reasons for the plaintiff's service rating are those reflected in the document itself: the plaintiff's unorthodox manner of requesting leave, her chronic tardiness, and her suspension. (Doc. 33 at 23; Doc. 41 at 7). Because the plaintiff does not challenge these reasons as insufficient to carry the defendants' intermediate burden, she is required to create a genuine issue of material fact as to whether the defendants' proffered reasons are a pretext for unlawful retaliation.

The plaintiff presents the following arguments in favor of pretext: (1) she has received uniformly satisfactory ratings except this one; (2) other employees under Bounds' supervision had lower leave balances; (3) her suspension did not affect how she performed her job; (4) other employees think highly of her abilities; (5) her immediate supervisor, Sergeant Taylor, apologized for the low rating; (6) Bounds engaged in other conduct suggestive of retaliation; and (7) Tillman has a pattern of retaliating against employees who oppose unlawful discrimination. (Doc. 38 at 19-24, 31-32). The Court reviews these items below, but only after noting that the plaintiff, by failing to argue otherwise, concedes for purposes of this motion

that she did indeed, during the rating period ending July 17, 2004, have the leave and tardiness issues attributed to her by Bounds.

The satisfactory ratings of previous supervisors can be of no consequence without a showing that, when under their supervision, the plaintiff had leave and tardiness issues similar to those noted by Bounds. The plaintiff does not even suggest that this is the case. Even had she done so, "differences in the evaluation of [a plaintiff's] performance do not raise a genuine issue as to pretext [because] [d]ifferent supervisors may impose different standards of behavior, and a new supervisor may decide to enforce policies that a previous supervisor did not consider important." *Rojas v. Florida,* 285 F.3d 1339, 1343 (11th Cir.2002); *cf. Silvera v. Orange County School Board,* 244 F.3d 1253, 1261 n. 5 (11th Cir.2001) ("[D]ifferences in treatment by different supervisors or decision makers can seldom be the basis for a viable claim of discrimination."). And if the opinions of former supervisors as to the plaintiff's performance cannot show pretext, certainly the opinions of co-workers cannot do so – especially when, as here, they do not address the plaintiff's leave and tardiness issues.

As discussed in Part III.A, the plaintiff's evidence of comparative leave balances comes from an irrelevant time period and moreover misses the point, since she was not rated poorly because of her low balances.

Bounds' testimony that the plaintiff's suspension did not "have anything to do with . . . the way she performs her job," (Doc. 40, Exhibit 6 at 77-78), is not suspicious, because the plaintiff has identified no evidence that such matters cannot be considered in assigning a service rating.

The plaintiff relies on her deposition testimony and that of a corporal to relate what Taylor told them she thought about the plaintiff's service rating. (Doc. 38 at 20). The defendants have objected to this evidence as hearsay, (Doc. 41 at 7), and the plaintiff has done nothing to refute this facially meritorious objection. "The general rule is that inadmissible hearsay cannot be considered on a motion for summary judgment," *Macuba v. Deboer,* 193 F.3d 1316, 1323 (11th Cir.1999), and the plaintiff has not offered to explain why her evidence is not captured by the general rule.[11] At any rate, Taylor's apology for the plaintiff's low service rating is, like the opinions of previous supervisors and current co-workers, of little import, since different supervisors may have different views as to what makes a good employee.

The plaintiff identifies several respects in which she has been treated unfairly by Bounds, beginning with Bounds' memorandum concerning overtime

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[11] The defendants have represented, without challenge from the plaintiff, that Taylor in sworn testimony has denied making these statements or disagreeing with the plaintiff's rating. (Doc. 41 at 7).

work. As discussed in Part II, the plaintiff cannot establish a prima facie case that the memorandum was either racially discriminatory or retaliatory. It thus cannot assist the plaintiff in showing pretext.

Next, the plaintiff complains that, when her daughter graduated from high school, Bounds required her to use sick leave rather than comp time to attend. (Doc. 38 at 21-22). It is difficult to discern how this requirement could furnish evidence that Bounds' August 2004 service rating of the plaintiff was in retaliation for her expression of opposition to unlawful employment practices in her July 2004 grievance, especially since: (a) the requirement was not directed just to the plaintiff but applied to everyone, (Doc. 40, Exhibit 1 at 104-05);[12] (b) the plaintiff identifies no protected activity as to which Bounds could have been retaliating by imposing the requirement; (c) it was imposed in 2003, (*id.* at 36), long before the events at issue herein; and (d) the plaintiff has provided no evidence that the use of comp time rather than sick leave damaged or even inconvenienced her.[13]

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[12] The plaintiff's statement in brief that "[n]o other person was required to use sick leave to attend their daughter's graduation," (Doc. 38 at 22), is unaccompanied by any citation to the record.

[13] The plaintiff concedes her pay was not affected by the requirement. (Doc. 38 at 22). She asserts that excessive use of sick leave hurts an employee's chances of promotion and that Bounds criticized her for using excessive sick leave, (*id.*), but she cites no record evidence that supports either proposition.

In a related vein, the plaintiff notes that, at some unspecified time in the past, Bounds required that all of the plaintiff's requests for time off be approved in advance by Bounds, even when Bounds was off duty. (Doc. 38 at 22). The plaintiff does not explain how this requirement suggests that Bounds retaliated against her in August 2004, and her own evidence reflects that another employee – who is not alleged to have engaged in protected activity – was subject to the same requirement. (Doc. 40, Exhibit 6 at 162-63). If anything, the requirement corroborates Bounds' articulated reason by showing that Bounds took the plaintiff's leave problems seriously.

The plaintiff's objection that Bounds required her to have a doctor's excuse for all absences, and that Bounds had Turner visit a doctor's office to confirm an excuse she provided, (Doc. 38 at 22-23), is subject to similar observations. The incident occurred in or after August 2005, (Doc. 38 at 23; Doc. 40, Exhibit 73), a year or more after Bounds' alleged retaliatory service rating, and so is remote in time. Moreover, both the requirement of a medical excuse and Turner's visit to check compliance are consistent with Bounds' articulated reason for the service rating and underscore how seriously Bounds took the plaintiff's leave issues. Finally, the plaintiff's evidence reflects that Turner's investigation was prompted by the circumstances of the plaintiff's leave, which would naturally stir suspicion of an employee with a history of gaming the system: an anomaly in the doctor's signature and the timing of the doctor's visit

(Mardi Gras Day, which employees had been forbidden to take off). (Doc. 40, Exhibit 5 at 82-84, 86).

Buried in an unrelated portion of her brief, the plaintiff asserts that she was thrice nominated for officer of the month but that Bounds "never approved her nominations" and required one of them to be resubmitted. (Doc. 38 at 27). The plaintiff's cited evidence confirms she was nominated three times and that Bounds required one nominee to resubmit his nomination because he had given it to the wrong person, (Doc. 40, Exhibit 19 at 12-14, Exhibits 20-21, 69), but it does not support the proposition that Bounds refused to approve or forward the nominations. At any rate, none of the nominations is dated earlier than December 27, 2004, and Bounds' earliest demonstrated contact with any of them occurred in January 2005, (*id.*, Exhibit 19 at 12, Exhibit 20), almost five months after the unsatisfactory service rating.

Finally, Tillman's alleged pattern of retaliating against employees who resisted race discrimination is irrelevant, given the utter lack of evidence that he had anything whatsoever to do with Bounds' assignment of a service rating.

In short, the plaintiff has failed to "demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Cooper v. Southern Co.*, 390 F.3d at 725.

The defendants are thus entitled to summary judgment as to this claim.

IV. Promotion-2004.

The plaintiff desires promotion from corrections officer to corrections corporal. On March 22 and May 8, 2004, two officers (Dan King and Davette Cobb, respectively) were promoted to corporal. The plaintiff complains that she should have been awarded one of these positions. (Doc. 38 at 25).

A. Race Discrimination.

"[T]o establish a prima facie case of discriminatory failure to promote, a plaintiff must prove: . . . (4) that other equally or less qualified employees who were not members of the protected class were promoted." *Denney v. City of Albany,* 247 F.3d 1172, 1183 (11th Cir.2001) (internal quotes omitted). As the defendants note, (Doc. 33 at 22), the two individuals who received promotion are black. The plaintiff acknowledges this inconvenient fact but suggests it should not affect her ability to prove a prima facie case because all the eligible candidates for promotion were black. (Doc. 38 at 3, 25). The plaintiff's argument is not only unsupported by authority or analysis, it is negated by her admission that she must prove that the successful candidates were not black. (*Id.* at 5-6).

B. Retaliation.

As noted in Part I.B, the only allegedly protected activities preceding June 2004 of which there is record evidence are the plaintiff's previous Title VII lawsuit and her February 18, 2004 officer narrative form. As discussed in that section, the lawsuit as a matter of law is too remote to satisfy the plaintiff's burden of showing a causal relation between her protected activity and an adverse employment action occurring more than three months later. That leaves the plaintiff to rely on her narrative.

The narrative states that Bounds asked the plaintiff if she had passed anything from a certain inmate to another inmate who happens to be the plaintiff's brother; that the plaintiff responded she had, but only books as she understood was allowed; and that someone ordered her brother moved from the barracks to the jail. The narrative expresses the plaintiff's opinion that the move was unfair, because her brother was a good inmate and because other inmates that are moved are transferred to the third floor. (Doc. 40, Exhibit 71). The narrative concludes as follows: "I just complaint [sic] last week to Sgt. Taylor and Lt. Bounds that I felt as if I was being mistreated. I know this is about me (McCann) not Christopher Hurd. I am writing this as a complaint of harrassing [sic] toward C/O McCann." (*Id.*).

The defendants argue that the plaintiff cannot rely on the narrative because "[n]othing in [it] indicates that she is complaining of racial discrimination

or retaliation for protected activity." (Doc. 41 at 6). As in Part II.B, the defendants offer no analysis or authority to support the proposition that the plaintiff's objection to "harass[ment]" is insufficient as a matter of law to invoke the opposition clause. As the defendants advance no other challenge to the plaintiff's prima facie case, the Court must, for purposes of this motion, treat the plaintiff's burden as satisfied and consider the defendants' articulated legitimate, nondiscriminatory reason for not selecting the plaintiff for promotion.

The defendants identify their reason for promoting King and Cobb ahead of the plaintiff as that they "were better qualified and more suited to the position" than she. (Doc. 33 at 22-23). As the plaintiff does not challenge the capacity of this reason to carry the defendants' intermediate burden, the Court turns to her evidence of pretext. This is primarily of two types: (1) the defendants' inability to identify any superior qualifications of King and Cobb; and (2) the defendants' failure to follow their usual procedures in making these promotion decisions. (Doc. 38 at 25-26).[14]

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[14] Although she also notes that she was ranked ahead of King and Cobb on the lists sent by the Board, (*id.* at 26), the Court does not assign any weight to this assertion in its analysis, because the plaintiff has not attempted to show that the candidates' rankings (the plaintiff fifth, King eighth, and Cobb ninth (McCann Deposition Exhibits 12-13)), reflect a meaningful disparity in qualifications as assessed by the Board.

In assessing pretext when the employer relies on relative qualifications, the key issue is not whether the successful candidate is in fact better qualified but whether the employer *believed* the successful candidate to be better qualified. Thus, for example, a plaintiff can support pretext by showing that her qualifications are so much greater than those of the successful candidate as to allow the jury to conclude that the employer did not truly believe the successful candidate was better qualified. E.g., *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1090-91 (11th Cir.2004).

Here, the plaintiff notes that, while the defendants insist that King and Cobb were more qualified for promotion than the plaintiff, neither Haley nor Turner – both of whom recommended King and Cobb for promotion – can identify a single qualification that the successful candidates possessed but that she lacked. (Doc. 38 at 26; Doc. 40, Exhibit 5 at 23-26; Haley Deposition at 28-30). This inability to identify any superior qualification of King and Cobb supports a reasonable inference that the defendants did not truly believe that King and Cobb were better qualified. Because the jury could conclude that the defendants did not believe the plaintiff to be less qualified, it could conclude that their articulated reason for the promotion decisions is false; *i.e.*, that it is not the actual reason for the decisions. *E.g., Wilson v. B/E Aerospace*, 376 F.3d at 1091.

"Proof that the defendant's explanation is unworthy of credence . . . may be quite persuasive" evidence

of discriminatory intent, both because the jury is entitled to consider a party's dishonesty as evidence of guilt and because, since the employer is in the best position to articulate its actual reason, eliminating the articulated reason often leaves discrimination as the most likely alternative. *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 147 (2000). Thus, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148. *Reeves* supplants the preexisting Eleventh Circuit rule that a plaintiff must always survive summary judgment if he "presents a prima facie case as well as plausible evidence that would permit a jury to disbelieve the employer's stated legitimate, nondiscriminatory reasons." *Bogle v. Orange County Board of County Commissioners,* 162 F.3d 653, 658 n. 6 (11th Cir.1998). Even after *Reeves,* however, "in the *usual* case, rejection of the reasons offered by the defendant, combined with the evidence supporting the prima facie case, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." *Ledbetter v. Goodyear Tire & Rubber Co.,* 421 F.3d 1169, 1185-86 (11th Cir.2005) (emphasis in original) (internal quotes omitted).

The defendants do not argue that this is the unusual case in which the plaintiff's prima facie case, plus her evidence that the defendants proffered a false reason for the alleged action, is insufficient to defeat summary judgment, and the Court will not

undertake such a subtle inquiry unilaterally on their behalf. At any rate, there is additional evidence of pretext in this case. There is evidence that the regular practice for selecting among candidates for promotion to corrections corporal was to convene a panel of Turner, Captain Omar Smith, Lieutenant Ester Lynn Mitchell, and sometime Haley. The makeup of each panel was determined by Haley. The panel would interview all the candidates on the list sent by the Board and recommend one candidate to Tillman for promotion. (Turner Deposition at 120; Haley Deposition at 23; Doc. 40, Exhibit 8 at 8). There is also evidence that, with respect to the promotions of King and Cobb, Smith was not on the panels. (Doc. 40, Exhibit 8 at 11-12).[15] Finally, there is evidence that Smith was impressed with the plaintiff when he served as her lieutenant. (Doc. 40, Exhibit 1 at 24-25; *id.*, Exhibits 35-36, 38, 41). "An employer's violation of its own normal [promotion] procedure may be evidence of pretext,"[16] and a reasonable inference

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[15] Smith testified that he does not recall sitting on either panel. (*Id.*). Although he previously testified that he did sit on the King panel, (*id.* at 9), he then doubted his memory because he "never interviewed" the plaintiff, as he would have had he sat on the King or Cobb panels. (*Id.* at 12). On motion for summary judgment, of course, the Court must accept the version most favorable to the plaintiff.

[16] *Bass v. Board of County Commissioners*, 256 F.3d 1095, 1108 (11th Cir.2001); *accord Walker v. Prudential Property & Casualty Insurance Co.*, 286 F.3d 1270, 1279 (11th Cir.2002) ("The bending of established rules may, of course, be suggestive of discrimination.").

from this evidence – to which the defendants have not responded – is that they ignored their normal selection procedures in an effort to decrease the chances that the plaintiff would be recommended for promotion.

"Whether judgment as a matter of law is appropriate in any given case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Reeves v. Sanderson Plumbing Products,* 530 U.S. at 148. The prima facie case stands for present purposes as established, the probative value of the defendants' inability to identify a single respect in which the plaintiff trailed the successful candidates is strong, the defendants have pointed to no evidence supporting their case, and the evidence that they manipulated the selection process to exclude the plaintiff further suggests a retaliatory motive.

C. Individual Defenses.

1. Bounds.

Even the plaintiff's evidence establishes that Bounds had no connection with the promotion decisions. It is not clear that the plaintiff intends to sue Bounds under this claim, but it is perfectly clear that she cannot do so.

2. Tillman.

The defendants argue that Tillman was unaware of any protected activity by the plaintiff and that this defeats her ability to establish a Title VII claim against him as agent of the employer. (Doc. 41 at 5). In the first place, the defendants have failed to submit the deposition page on which they rely for the proposition that Tillman was ignorant of the plaintiff's protected activities. More fundamentally, Tillman's lack of retaliatory motive, if shown, would not of itself preclude Title VII liability, because "[d]isparate treatment analysis requires that none of the participants in the decision-making process be influenced by [retaliatory] bias." *Jones v. Gerwens*, 874 F.2d at 1541 n. 13. In particular, "[i]f the Chief were not motivated by [retaliatory] animus but [Haley or Turner], his subordinate[s], were consciously recommending [others for promotion in retaliation against the plaintiff], the Chief's neutrality with respect to [retaliation] would not cure [Haley and Turner's] [retaliatory] bias. . . . " *Id.*; *accord Anderson v. WBMG-42*, 253 F.3d 561, 566 (11th Cir.2001).

3. Haley and Turner.

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights

of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).

"[T]he burden is first on the defendant to establish that the allegedly unconstitutional conduct occurred while he was acting within the scope of his discretionary authority." *Harbert International, Inc. v. James,* 157 F.3d 1271, 1281 (11th Cir.1998). The burden then shifts to the plaintiff to show that the individual defendants' conduct "violated a clearly established statutory or constitutional right." *E.g., Grayden v. Rhodes,* 345 F.3d 1225, 1231 (11th Cir.2003). The inquiry may be broken down into two parts: (1) whether the evidence, if believed, would establish a violation of the plaintiff's rights; and (2) whether those rights were clearly established at the time of the alleged deprivation. *E.g., id.*

Although the defendants have not attempted to prove that Haley and Turner were acting within their discretionary authority in recommending King and Cobb for promotion, the Court will assume for present purposes that they were so acting.

"Section 1983 . . . does not create any substantive federal rights. . . . Therefore, the plaintiff must point to a specific federal right that the defendant violated." *Williams v. Board of Regents,* 441 F.3d 1287, 1301 (11th Cir.2006) (citation omitted). The sorts of rights that can be vindicated through Section 1983 are limited to those "secured by the Constitution and laws." 42 U.S.C. § 1983. The complaint identifies no constitutional rights the plaintiff is addressing

through Section 1983, (Doc. 1), so she can be vindicating only statutory rights. The only statutes she identifies in her complaint are Title VII and Section 1981. Rights under Title VII cannot be upheld under Section 1983, but those provided by Section 1981 can be.[17] Accordingly, the plaintiff's Section 1983 claim is brought exclusively in order to vindicate rights under Section 1981.

"*Andrews* [*v. Lakeshore Rehabilitation Hospital,* 140 F.3d 1405 (11th Cir.1998)] does establish that § 1981 encompasses a cause of action for retaliation. This cause of action includes retaliation for a plaintiff's opposition to race discrimination, whether or not he personally is the victim of that race discrimination." *Tucker v. Talladega City Schools,* 171 Fed. Appx. 289, 295 (11th Cir.2006). As Andrews was decided in 1998, the proposition that it is unlawful under Section 1981 to retaliate against an employee for complaining of race discrimination was clearly established when Haley and Turner acted in early 2004. As discussed in Part IV.B, the evidence if believed would establish a violation of this right. The defendants do not argue otherwise.

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[17] *Compare Arrington v. Cobb County,* 139 F.3d 865, 872 (11th Cir.1998) ("Of course, an allegation of a Title VII violation cannot provide the sole basis for a § 1983 claim.") *with Butts v. County of Volusia,* 222 F.3d 891, 892 (11th Cir.2000) ("[Section] 1983 contains the sole cause of action against state actors for violations of § 1981.").

Indeed, the defendants offer no qualified immunity argument of any sort specifically directed to this claim. The Court, however, assumes that the defendants intend to invoke certain propositions asserted generally elsewhere in their briefing, viz: (1) they did not violate the plaintiff's rights under Section 1981; (2) they were not involved in the adverse job action; and (3) their actions were taken for legitimate, non-discriminatory reasons. (Doc. 33 at 3-4). The Court responds as follows: (1) the plaintiff has a right under Section 1981 not to be retaliated against for opposing race discrimination and, as discussed in Part IV.B and this section, there is a jury question presented as to whether she was so retaliated against; (2) by the defendants' own evidence, they were involved in the decision not to promote the plaintiff; and (3) as discussed in Part IV.B and this section, there is a jury question presented as to the actual reasons for the defendants' actions.

Without attempting to tie it in to this case or claim, the defendants note that, even when there is evidence a defendant acted with an unlawful motive, he is still entitled to qualified immunity if "the record indisputably establishes that the defendant in fact was motivated, *at least in part,* by lawful considerations." *Stanley v. City of Dalton,* 219 F.3d 1280, 2196 (11th Cir.2000) (emphasis in original). (Doc. 33 at 9-10). The trouble is that the record does not indisputably establish that Haley and Turner were in fact motivated at all by lawful considerations. The single lawful reason they have given for their promotion

recommendations is that they believed King and Cobb were better qualified than the plaintiff, and that bald assertion has been so undermined by their inability to name a single respect in which the plaintiff was less qualified (and by the unexplained irregularity of excluding a supporter of the plaintiff from the panel) that a jury would be entitled to find that they did not really base their decision on relative qualifications but on retaliation. *See Bogle v. McClure,* 332 F.3d 1347, 1356 (11th Cir.2003) (where the defendants offered a single race-neutral reason for their action, the plaintiff's evidence that the reason was a sham designed to disguise the defendants' racial motivation precluded qualified immunity).

4. Tillman, Haley and Turner.

The defendants argue that the official-capacity claims against Tillman, Haley and Turner should be dismissed pursuant to the sovereign immunity reflected in the Eleventh Amendment. (Doc. 33 at 7-8). That immunity, however, has no application to appropriate prospective equitable relief, *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 102-03 (1984), and the complaint prays for just such relief. (Doc. 1 at 6).

V. Promotion-2005.

The parties agree that the unsatisfactory service rating the plaintiff received in August 2004 rendered

her ineligible for promotion. (Doc. 38 at 26; Doc. 41 at 9). The plaintiff argues without amplification that, if the service rating and/or the suspension on which it was partially based were the result of race discrimination or retaliation, then "[a]ll promotions since [her] suspension are in question." (Doc. 38 at 26). While insisting that there have been "numerous" promotions to corrections corporal since her suspension, (*id.*), she identifies none. The Court therefore confines its review to the two promotions identified by the defendants: those of Anisa Pope and Baron Hayes, both of which occurred on July 30, 2005. (Doc. 33 at 22; McCann Deposition, Exhibit 7).

A. Race Discrimination.

Both Pope and Hayes are black. (Doc. 33 at 22). As noted in Part IV.A, this fact is fatal to the plaintiff's prima facie case.

B. Retaliation.

The plaintiff does not allege that the failure to promote her was independently retaliatory but argues instead that the retaliatory nature of her suspension and/or service rating caused her to be disqualified for consideration for promotion. Because, as discussed in Parts I.B and III.B, the plaintiff has failed to create a jury issue as to retaliation concerning either her suspension or her service rating, she has necessarily failed to support any claim that

retaliation in those decisions deprived her of promotional opportunities.

VI. Shift Assignment.

Sometime in 2003, Bounds moved the plaintiff from the day shift to the evening shift. (McCann Deposition at 87; Doc. 40, Exhibit 22).

A. Race Discrimination.

The defendants focus their attention on the requirement of an adverse employment action. (Doc. 33 at 24)."We therefore hold that, to prove adverse employment action in a case under Title VII's anti-discrimination clause, an employee must show a *serious and material* change in the terms, conditions, or privileges of employment. Moreover, . . . the employment action must be materially adverse as viewed by a reasonable person in the circumstances." *Davis v. Town of Lake Park,* 245 F.3d 1232, 1239 (11th Cir.2001) (emphasis in original).

The Supreme Court recently held that Title VII's anti-retaliation provision applies only when "a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Railway Co. v. White,* 2006 WL 1698953 at *10

(2006).[18] *White* echoes *Davis* by requiring a materially adverse change as viewed by a reasonable worker. By declaring that "the significance of any given act of retaliation will often depend upon the particular circumstances," *id.* at 11, it also parallels *Davis*'s call to review "the circumstances."

To illustrate the importance of the circumstances, the *White* Court noted that "[a] schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." 2006 WL 1698953 at *11. That is, a shift change does not automatically constitute an adverse employment action for retaliation purposes under *White,* but can do so only if the plaintiff shows circumstances making the shift change materially adverse to a reasonable person operating in such circumstances. After *Davis,* no more lenient rule can apply in the discrimination context.

In brief, the plaintiff asserts that "[a] nighttime shift worked a hardship on McCann, who has a special needs daughter." (Doc. 38 at 27). The plaintiff, however, has identified no evidence that working 3 p.m. to 11 p.m. rather than 7 a.m. to 3 p.m. made any difference in her care for her daughter. On the

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[18] The Supreme Court presumably used "charge" in the broad sense of an accusation, rather than in the narrow sense of a formal charge of discrimination with the EEOC, since the facts in *White* involved only an internal complaint. *Id.* at *3.

contrary, the evidence is that the plaintiff's daughter, who has heart problems and is deaf, graduated from high school in 2003, (McCann Deposition at 36), the same year the plaintiff's shift was changed. Without proof of circumstances that render a shift change materially adverse, the plaintiff has failed to satisfy the adverse-employment-action element of her prima facie case.[19]

B. Retaliation.

In the retaliation context after *White,* the plaintiff can show materiality by showing that the employer's action "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." 2006 WL 1698953 at *10. In making that determination, "[c]ontext matters," requiring a review of the plaintiff-specific circumstances. *Id.* at *11. Because, as discussed in Part VI.A, the plaintiff has failed to provide evidence of any circumstances she operated under that might cause a reasonable employee to avoid complaining of

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[19] *Davis* may draw a tighter circle for adverse employment actions in the discrimination context than *White* does in the retaliation context, since *Davis* requires that the action be not only material but also "serious." Because the plaintiff cannot satisfy the *White* standard, the Court need not decide whether a shift change can never be "serious" under *Davis. See generally Allen v. United States Postmaster General,* 158 Fed. Appx. 240, 244 (11th Cir.2005) (a shift change does not represent an adverse employment action for purposes of a retaliation claim under the Rehabilitation Act).

unlawful discrimination in order to avoid a transfer to the evening shift, she cannot satisfy the adverse-action element of her prima facie case.

VII. Failure to Transfer.

The plaintiff asserts in brief that she has made "numerous" requests to transfer away from Bounds and that Bounds has denied every request. (Doc. 38 at 26). The only evidence cited by the plaintiff relates to a request for transfer dated October 6, 2003 and denied by Bounds three days later. (Doc. 40, Exhibit 46). The Court's consideration is thus limited to that single incident.

A. Race Discrimination.

The defendants again challenge the plaintiff's ability to establish an adverse employment action. (Doc. 33 at 24). A transfer can be an adverse employment action if the new position carries lesser pay, prestige or responsibility, and "[t]he flip side of this coin would appear to be that a failure to transfer may constitute an adverse employment action if [the new position] entails an increase in pay, prestige or responsibility." *Morris v. Wallace Community College,* 125 F.Supp.2d 1315, 1328 (S.D.Ala.2001); *accord Gaddis v. Russell Corp.,* 242 F.Supp.2d 1123, 1145 (M.D.Ala.2003).

The plaintiff's October 2003 request sought transfer from the barracks to the Metro jail. (Doc. 40,

Exhibit 46). The plaintiff does not even allege that working in the Metro jail as a correctional officer carried heightened pay, prestige or responsibility as compared with working in the barracks as a correctional officer. Instead, she asserts that she simply wanted to "transfer from under the supervision of Lt. Bounds." (Doc. 38 at 26). The plaintiff offers no authority for the proposition that a desire for a different supervisor transforms a failure to obtain transfer into an adverse employment action. Even if a failure to transfer could be considered objectively "serious and material" when the supervisor has unlawfully discriminated or retaliated against the employee, as discussed in this opinion the plaintiff has failed to create a jury issue as to race discrimination or retaliation by Bounds at any time, much less prior to October 2003.

B. Retaliation.

As noted in Part VI, the inquiry is whether the plaintiff's circumstances in October 2003 were such that a reasonable employee in those circumstances might withhold a complaint of discrimination rather than risk being denied a lateral transfer to another location. The plaintiff has presented no evidence of circumstances concerning her relationship with Bounds that could allow this inquiry to be answered in the affirmative. While she has submitted an October 2003 officer narrative form from a co-worker stating that she "is a disappointed and hurt officer who feel [sic] like she is being mistreated at the

barracks," (Doc. 40, Exhibit 27), the issue is not how the plaintiff subjectively felt but the existence of underlying circumstances that could cause a reasonable employee to feel so mistreated by Bounds that she would consider not complaining of discrimination in order not to jeopardize a transfer to another supervisor. The plaintiff has failed to address this issue, and the omission is fatal to her ability to establish the adverse action predicate to her prima facie case.

VIII. Hostile Work Environment.

"This court has repeatedly instructed that a plaintiff wishing to establish a hostile work environment claim show: (1) that he belongs to a protected group; (2) that he has been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee, such as national origin; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or of direct liability." *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir.2002).

The fourth element, on which the defendants' argument focuses, "contains both an objective and a subjective element." *Miller v. Kenworth*, 277 F.3d at 1276. "In evaluating the objective severity of the harassment, we consider, among other factors: (1) the

frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." *Id.*

The plaintiff identifies four areas in which she has been subjected to a hostile working environment: (1) white employees make racially derogatory comments about blacks; (2) black employees are subjected to harsher discipline than whites; (3) employees complaining of discrimination are retaliated against; and (4) complaints of discrimination are not investigated. (Doc. 38 at 28-31).

The plaintiff relies on evidence that Bounds called her a "girl" and that Bounds called two black male employees "boys." (Doc. 38 at 29; Doc. 40, Exhibit 1 at 46-49). The plaintiff's evidence reflects that Bounds used the term once to each employee, for a total of three incidents. (*Id.*). These are the only racially insensitive remarks the plaintiff heard by her supervisors from 2001 through 2005. (*Id.* at 49).

The plaintiff also relies on evidence that, in or before 2003, Tillman referred to a former black female employee as a "nigger bitch" and stated he had never received the "nigger vote" and didn't want it. (Doc. 40, Exhibit 60). There is no indication that either statement was made more than once, for a total of two incidents. It is clear that Tillman did not make the remarks to the plaintiff or in her presence, (McCann Deposition at 225), and the plaintiff offers

no evidence that she (as opposed to her lawyer) has heard these statements even now. Nevertheless, the Court will assume for present purposes that at some point in or after 2003 she became aware of the statements.

These are the only racial comments on which the plaintiff relies. The remainder of her allegations and evidence concern alleged patterns of discrimination practiced against black employees. The plaintiff has cited, and the Court can find, no authority for the proposition that such matters can be considered in evaluating the existence of a racially hostile work environment. On the contrary, "[w]hen the workplace is permeated with discriminatory *intimidation, ridicule, and insult,* that is sufficiently severe and pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." *National Railroad Passenger Corp. v. Morgan,* 536 U.S. 101, 116 (2002) (emphasis added) (internal quotes omitted). That one of the factors employed to determine if a hostile work environment exists is "whether [the conduct] is physically threatening or humiliating, or a mere offensive utterance," *Harris v. Forklift Systems, Inc.,* 511 U.S. 17, 23 (1993), echoes this limitation.

The *Morgan* Court held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." 536 U.S. at 113. That is, discrete discriminatory acts must be challenged as separate statutory violations and not lumped together under the rubric

of hostile work environment. The plaintiff, who describes her 1998 termination (which formed the basis of her 1999 lawsuit) as contributing to her hostile work environment, (Doc. 38 at 29), is in direct violation of this principle. The same is true of the plaintiff's reliance on discrete acts of retaliation and discriminatory discipline committed against other employees. (*Id.* at 29-31). Whatever use the plaintiff might have made of these incidents had she brought a pattern-and-practice claim, she cannot employ them to cobble together a claim of hostile work environment.

The plaintiff's hostile work environment claim, therefore, is limited to three instances of racially insensitive language and two instances of a racial epithet, spread over a period exceeding two years.[20] The plaintiff has offered no evidence that this language interfered with her work performance.[21] The defendants argue that the plaintiff cannot show that this conduct was objectively severe or pervasive enough to alter the terms and conditions of her employment. (Doc. 33 at 26-27).

In *Barrow v. Georgia Pacific Corp.*, 144 Fed. Appx. 54 (11th Cir.2005), the Court held that one

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[20] The plaintiff worked under Bounds from June 2003 to September 2005. (Doc. 39 at 2, ¶ 6; Doc. 40, Exhibit 77).

[21] Her only testimony on this point is directed to the totality of all the myriad aspects of her job that displeased her, and even then she insisted that she performed her job duties in a manner that was above satisfactory. (McCann Deposition at 127).

plaintiff's evidence was too isolated and sporadic to be sufficiently severe or pervasive to alter the terms and conditions of his employment, even though part of the plaintiff's evidence was that his supervisor called him a "nigger" three times within the space of a year. *Id.* at 57. The plaintiff here has never had that epithet directed to her or spoken in her presence, and she has heard of its use no more than twice. She has also heard the term "boy" used once and heard of it being used a second time. The only term directed to the plaintiff is "girl," which was used once. These five incidents are spread over a time period twice the length of that in *Barrow.* The evidence in this case cannot be meaningfully distinguished from that in *Barrow,* which evidence was held insufficient as a matter of law to support a hostile work environment claim. *Cf. Mahgoub v. Miami Dade Community College,* 2006 WL 952278 at *1 (11th Cir.2006) (four incidents of offensive ethnic utterances over an unspecified period of time, with one accompanied by a threatening physical gesture, but which did not interfere with the plaintiff's work performance, were legally insufficient to support a hostile work environment claim).

CONCLUSION

For the reasons set forth above, the defendants' motions for summary judgment are **denied** with respect to the plaintiff's claim that she was denied promotions in March and May 2004 on the basis of retaliation. This claim will proceed with respect to all

defendants other than Bounds. In all other respects, the defendants' motions for summary judgment are **granted.**

STATUTES INVOLVED

Section 1981(a) of 42 U.S.C. provides in pertinent part "All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts." Section 1981(b) of 42 U.S.C. provides:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

Section 1983 of 42 U.S.C. provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

ELEVENTH CIRCUIT DECISIONS APPLYING THE "NEARLY IDENTICAL" STANDARD

McCann v. Tillman, 526 F.3d 1370 (11th Cir. 2008) (sections 1981 and 1983; discriminatory discipline claim)

Howard v. Oregon Television, Inc., 2008 WL 1947094 (11th Cir. 2008) (Title VII; discriminatory discipline claim)

Wood v. K-Mart Corp., 2008 WL 942859 (11th Cir. 2008) (Title VII; discriminatory discipline claim)

Phillips v. Aaron Rents, Inc., 262 Fed.Appx. 202 (11th Cir. 2008) (Title VII and section 1981; discriminatory discipline claim)

Mathis v. Wachovia Bank, 255 Fed.Appx. 425 (11th Cir. 2007) (Title VII and section 1981; discriminatory discipline claims)

McDowell v. Southern Nuclear Operating Co., Inc., 251 Fed.Appx. 651 (11th Cir. 2007) (Title VII and section 1981; discriminatory discipline claims)

Cuevas v. American Express Travel Related Services Co., Inc., 256 Fed.Appx. 241 (11th Cir. 2007) (Title VII; discriminatory discipline claim)

Sumerlin v. AmSouth Bank, 242 Fed.Appx. 687 (11th Cir. 2007) (Title VII and section 1981; salary discrimination claim)

Dawson v. Henry County Police Department, 238 Fed.Appx. 545 (11th Cir. 2007) (Title VII and sections 1981 and 1983; discriminatory demotion claim)

Robinson v. LaFarge North America, Inc., 240 Fed.Appx. 824 (11th Cir. 2007) (Title VII and section 1981; discriminatory demotion claim)

Clark v. Potter, 232 Fed.Appx. 895 (11th Cir. 2007) (Title VII; discriminatory discipline claim)

Wright v. Sanders Lead Co., Inc., 217 Fed.Appx. 925 (11th Cir. 2007) (Title VII; discriminatory discipline claim)

Bell v. Capital Veneer Works, 2007 WL 245875 (11th Cir. 2007) (Title VII, Age Discrimination in Employment Act and section 1981; discriminatory layoff claim)

McCalister v. Hillsborough County Sheriff, 211 Fed.Appx. 883 (11th Cir. 2006) (Title VII; discriminatory discipline claim)

Keith v. MGA, Inc., 211 Fed.Appx. 824 (11th Cir. 2006) (Title VII and section 1981; discriminatory dismissal claim)

Toney v. Montgomery Jobs Corps, 211 Fed.Appx. 816 (11th Cir. 2006) (Title VII; discriminatory dismissal claim)

Roland v. United States Postal Service, 200 Fed.Appx. 868 (11th Cir. 2006) (Title VII; discriminatory demotion claim)

Tomczyk v. Jocks & Jills Restaurants, LLC, 198 Fed.Appx. 804 (11th Cir. 2006) (Title VII and section 1981; discriminatory discipline claim)

Mack v. ST Mobile Aerospace Engineering, Inc., 195 Fed.Appx. 829 (11th Cir. 2006) (Title VII and section 1981; discriminatory demotion claim)

Dickinson v. Springhill Hospitals, Inc., 187 Fed.Appx. 937 (11th Cir. 2006) (Title VII; discriminatory discipline claim)

Burl v. Principi, 181 Fed.Appx. 760 (11th Cir. 2006) (discriminatory discipline claim)

Burke-Fowler v. Orange County, Florida, 447 F.3d 1319 (11th Cir. 2006) (Title VII and section 1981; discriminatory discipline claim)

Hammons v. George C. Wallace State Community College, 174 Fed.Appx. 459 (11th Cir. 2006) (Title VII; discriminatory refusal to renew contract)

Filius v. Potter, 176 Fed.Appx. 8 (11th Cir. 2006) (Title VII; discriminatory discipline claim)

Hendrix v. Snow, 170 Fed.Appx. 68 (11th Cir. 2006) (Title VII; discriminatory discharge claim)

Boykin v. Bank of America Corp., 162 Fed.Appx. 837 (11th Cir. 2005) (Fair Housing Act; discriminatory loan terms claim)

Egued v. Postmaster General of U.S. Postal Service, 155 Fed.Appx. 439 (11th Cir. 2005) (Title VII; discriminatory discipline case)

Amos v. Tyson Foods, Inc., 153 Fed.Appx. 637 (11th Cir. 2005) (Title VII; discriminatory discipline claim)

McDonell v. Gonzales, 151 Fed.Appx. 780 (11th Cir. 2005) (Title VII)

Embry v. Callahan Eye Foundation Hospital, 147 Fed.Appx. 819 (11th Cir. 2005) (Title VII; discriminatory discipline claim)

Johnson v. Atlanta Independent School System, 137 Fed.Appx. 311 (11th Cir. 2005) (Title VII and Age Discrimination in Employment Act; discriminatory dismissal claim)

Moore v. Alabama Dept. of Corrections, 137 Fed.Appx. 235 (11th Cir. 2005) (Title VII and section 1983; discriminatory discipline claim)

Cooley v. Great Southern Wood Preserving, 138 Fed.Appx. 149 (11th Cir. 2005) (Title VII; discriminatory discipline claim)

Morris v. Emory Clinic, Inc., 402 F.3d 1076 (11th Cir. 2005) (Age Discrimination in Employment Act; discriminatory discharge claim)

Wilson v. B/E Aerospace, Inc., 376 F.3d 1079 (11th Cir. 2004) (Title VII; discriminatory discharge claim)

Maynard v. Board of Regents of the Division of Universities of the Florida Dept. of Ed., 342 F.3d 1281 (11th Cir. 2003) (Title VII; termination from residence program)

Williams v. Motorola, Inc., 330 F.3d 1284 (11th Cir. 2002) (Title VII; claim of discrimination in pay, assignments, and termination)

Silvera v. Orange County School Bd., 244 F.3d 1253 (11th Cir. 2001) (Title VII; discriminatory termination claim)

Maniccia v. Brown, 171 F.3d 1264 (11th Cir. 1999) (Title VII; discriminatory termination claim)

Hawkins v. Ceco Corp., 883 F.2d 977 (11th Cir. 1989) (Title VII and section 1981; discriminatory dismissal claim)

Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181 (11th Cir. 1984) (Title VII; discriminatory dismissal claim)

Davin v. Delta Air Lines, Inc., 678 F.2d 567 (5th Cir. Div. A 1982) (Title VII; discriminatory dismissal claim)

ELEVENTH CIRCUIT DECISIONS REQUIRING SIMILARLY SITUATED COMPARATOR TO ESTABLISH A PRIMA FACIE CASE JANUARY 1, 2007 THROUGH DECEMBER 31, 2007

Edmondson v. Board of Trustees of University of Alabama, 258 Fed.Appx. 250, 251 (11th Cir. 2007)

McCloud v. Potter, 257 Fed.Appx. 185, 186 (11th Cir. 2007)

Hankinson v. Thomas County School System, 257 Fed.Appx. 199, 201 (11th Cir. 2007)

Tolbert v. Briggs and Stratton Corp., 256 Fed.Appx. 340, 341 (11th Cir. 2007)

Gupta v. Walt Disney World Co., 256 Fed.Appx. 279, 282 (11th Cir. 2007)

DaCosta v. Birmingham Water Works & Sewer Bd., 256 Fed.Appx. 283, 288 (11th Cir. 2007)

Mathis v. Wachovia Bank, 255 Fed.Appx. 425, 430 (11th Cir. 2007)

Morris v. Potter, 251 Fed.Appx. 667, 668 (11th Cir. 2007)

Harrington v. Disney Regional Entertainment, Inc., 2007 WL 3036873 at *8 (11th Cir. 2007)

McDowell v. Southern Nuclear Operating Co., Inc., 251 Fed.Appx. 651, 652 (11th Cir. 2007)

Nicholas v. Board of Trustees of University of Alabama, 251 Fed.Appx. 637, 643 (11th Cir. 2007)

Cuevas v. American Exp. Travel Related Services Co., Inc., 256 Fed.Appx. 241, 243 (11th Cir. 2007)

Anderson v. United Parcel Service, 248 Fed.Appx. 97, 99 (11th Cir. 2007)

Weatherspoon v. Baptist Hosp., Inc., 244 Fed.Appx. 963, 963 (11th Cir. 2007)

Sumerlin v. AmSouth Bank, 242 Fed.Appx. 687, 689 (11th Cir. 2007)

Dawson v. Henry County Police Dept., 238 Fed.Appx. 545, 547 (11th Cir. 2007)

Carlson v. Liberty Mut. Ins. Co., 237 Fed.Appx. 446, 450 (11th Cir. 2007)

Perdue v. Pilgrim Pride, 237 Fed.Appx. 432, 434 (11th Cir. 2007)

Clark v. Potter, 232 Fed.Appx. 895, 896 (11th Cir. 2007)

Cantazaro v. Lyons, 232 Fed.Appx. 878, 880 (11th Cir. 2007)

Wright v. Sanders Lead Co., 217 Fed.Appx. 925, 928 (11th Cir. 2007)

Bell v. Capital Veneer Works, 2007 WL 245875 at *1 (11th Cir. 2007)

Ivey v. Paulson, 222 Fed.Appx. 815, 817 (11th Cir. 2007)

DISTRICT COURT DECISIONS IN THE ELEVENTH CIRCUIT HOLDING THE "NEARLY IDENTICAL" STANDARD NOT SATISFIED, JANUARY 1, 2007 THROUGH DECEMBER 31, 2007

Defrance v. CompuCredit Corp., 2007 WL 4373593 at *10 (N.D.Ga. 2007)

Robinson v. Untied Parcel Service, Inc., 2007 WL 3484743 at *4 (N.D.Ga. 2007)

Jones v. Alabama Power Co., 2007 WL 3496720 at *6-*7 (M.D.Ala. 2007)

Howard v. Oregon Television, Inc., 2007 WL 3376796 at *4-*5 (M.D.Fla. 2007)

Metz v. Home Depot, USA, Inc., 2007 WL 3231795 at *7 n.10 (M.D.Fla. 2007)

Pittman v. Marshall, 2007 WL 3049563 at *3-*4 (M.D.Ala. 2007)

Byer v. DTG Operations, Inc., 2007 WL 2746619 at *9-*10 (S.D.Fla. 2007)

Nwaogu v. Wellstar Health System, Inc., 2007 WL 2479277 at *6-*7 (N.D.Ga. 2007)

Lewis v. City of Montgomery, 2007 WL 2325943 at *4-*6 (M.D.Ala. 2007)

Grider v. Alabama Dept. of Corrections, 2007 WL 2254405 at *7-*8 (M.D.Ala. 2007)

Lewis v. Penske Logistics, LLP, 2007 WL 2156408 at *8-*9 (M.D.Ala. 2007)

Schultz v. Board of Trustees of the University of West Florida, 2007 WL 2066183 at *11-*12 (N.D.Fla. 2007)

Blair v. Atlanta Gastroenterology Associates, LLC, 2007 WL 2001769 at *5-*7 (N.D.Ga. 2007)

Williams v. Alabama Dept. of Transportation, 509 F.Supp.2d 1046, 1058 n.5 (M.D.Ala. 2007)

Richardson v. Alabama Pine Pulp Co., Inc., 513 F.Supp.2d 1314, 1321-22 (S.D.Ala. 2007)

Fikes v. Alabama Dept. of Youth Services, 2007 WL 1673940 at *5-*6 (M.D.Ala. 2007)

McCloud v. Potter, 506 F.Supp. 1031, 1047 (S.D.Ala. 2007)

Local 491, Int'l Brotherhood of Police Officers v. Gwinnett County, GA, 510 F.Supp.2d 1271, 1298 (N.D.Ga. 2007)

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Hegre v. Alberto-Culver USA, Inc., 485 F.Supp.2d 1367, 1379 (S.D.Ga. 2007)

Sampat v. ABB Inc., 2007 WL 988766 at *7 (M.D.Ga. 2007)

Ibrahim v. Hillsborough Area Regional Transit Authority, 2007 WL 1017683 at *6 (M.D.Fla. 2007)

Brown v. Greene County, Georgia, 2007 WL 945144 at *3-*4 (M.D.Ga. 2007)

Bazemore v. Georgia Technology Authority, 2007 WL 917280 at *4 (N.D.Ga. 2007)

Anderson v. United Parcel Service, Inc.,. 506 F.Supp.2d 1215, 1225 (S.D.Fla. 2007)

Mathis v. Wachovia, 509 F.Supp.2d 1125, 1134-35 (N.D.Fla. 2007)

Dowlatpanah v. Wellstar Health System, Inc., 2007 WL 639875 at *4 (N.D.Ga. 2007)

Davis v. City of Panama City, Florida, 520 F.Supp.671, 685-86 (N.D.Fla. 2007)

McDowell v. Southern Nuclear Operating Co., 2007 WL 328952 at *6 (M.D.Ala. 2007)

George v. Orange County, Florida, 2007 WL 28375 at *8 (M.D.Fla. 2007)

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No. 08-163

FILED

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

GEORGIA MCCANN,

Petitioner,

v.

SAM-COCHRAN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this case presents the Eleventh Circuit's "nearly identical" standard for comparators in Title VII disparate treatment cases where the lower courts' decisions found the comparators' behavior too significantly and qualitatively different from Petitioner's?

PARTIES

Pursuant to Rule 24.2, Respondent accepts Petitioner's statement of the parties.

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OPINIONS BELOW

Pursuant to Rule 24.2, Respondent accepts Petitioner's citations to the opinions below.

STATEMENT OF JURISDICTION

Pursuant to Rule 24.2, Respondent accepts Petitioner's statement of jurisdiction.

STATUTES INVOLVED

Pursuant to Rule 24.2, Respondent accepts Petitioner's statement of the statutes involved.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner, Georgia McCann (hereinafter, "McCann") commenced this action by filing a complaint in the United States District Court of the Southern District of Alabama on June 22, 2005. The complaint generally alleged Title VII race-discrimination and retaliation claims against Respondents, as well as similar claims made pursuant to 42 U.S.C. §§ 1981 and 1983. In relevant part,[1] the summary judgment as to the

[1] The procedural history of this case is somewhat complex, as the Mobile County Personnel Board was also a defendant,

(Continued on following page)

claim allegedly at issue in this petition – McCann's Title VII disparate treatment claim – was entered on July 6, 2006 and subsequently affirmed by the Eleventh Circuit on May 9, 2008. The instant petition timely followed.

B. Statement of the Facts

The facts underlying McCann's disparate treatment claim are quite simple. On June 1, 2004, McCann learned her son was in the Washington County Jail. (App. 27a). McCann called her supervisor, requested an "emergency vacation day" to deal with this situation, was granted the requested leave, and proceeded to the Washington County Jail. (App. 27a). McCann wore her uniform to the Washington County Jail in violation of a directive issued in 2003 that forbade Mobile County Sheriff's Office employees from wearing their uniforms except at work and on their way to and from work. (App. 27a). Nothing more might have come of this, except that Sheriff Wheat of Washington County wrote a letter to the Mobile County Sheriff on June 4, 2004 complaining about McCann's behavior at the Washington County Jail. (App. 27a). In particular, Sheriff Wheat complained that McCann had behaved "irrationally and disrespectfully" toward both him and his deputies,

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and a separate interlocutory appeal was taken by Respondents on the issue of qualified immunity with regard to the claims made under sections 1981 and 1983.

made false accusations about them, and generally tried to use her status and uniform as a Mobile County corrections officer in an attempt to influence the bonding and release of her son. (App. 27a). A pre-disciplinary panel subsequently found McCann guilty of several charges based on this incident. (App. 27a). McCann subsequently appealed to the Mobile County Personnel Board which sustained the findings of the pre-disciplinary panel. (App. 27-28a).[2] The June 1, 2004 incident and the discipline which resulted from it – a suspension without pay for 10 days – form the factual basis for the disparate treatment claim which is the sole issue on this petition.

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[2] The "truth" of the allegations against McCann with regard to this incident are of course not strictly relevant to McCann's disparate-treatment claim. This being said, the district court noted pointedly that the evidence presented to the Mobile County Personnel Board overwhelmingly showed that McCann was in fact guilty of being irrational and discourteous to Sheriff Wheat and his staff, and that the evidence strongly supported the proposition that she had used her uniform and position in an attempt to influence the bonding and release of her son. (App. 28a n.3). The district court also noted that the evidence was somewhat more evenly divided as to the issue of whether McCann was aware of the uniform directive which she undisputedly violated on that occasion, but it was still more than strong enough to support the finding that she did actually know about it – particularly given the fact that McCann resisted the bonding company's efforts to photograph her on that occasion and that she attempted to disguise her uniform when her picture was actually taken. (App. 28a n.3).

SUMMARY OF THE ARGUMENT

This case does not implicate the Eleventh Circuit's "nearly identical" rule applicable to Title VII disparate treatment employment discrimination cases. McCann broadly claims she was subjected to racial discrimination in her employment as a corrections officer for the Mobile County Sheriff's Office. McCann incorrectly states that the district court and the Eleventh Circuit dismissed her disparate treatment claim because the similarly-situated comparators she identified were not "nearly identical." (Pet. Br. at 1-2). In fact, both the district court and the Eleventh Circuit dismissed McCann's claims because the comparators she identified were in fact "qualitatively different" and because McCann's conduct was "plainly . . . more serious than that of her comparators." (App. 9-10a, 33a). In other words, McCann's claims were dismissed because her comparators were not "similarly situated" to her under any standard, let alone the "nearly identical" standard applicable in the Eleventh Circuit. As a result, this case does not properly present any question regarding the applicability of the "nearly identical" standard.

Respondents must also take issue with McCann's characterization of the undisputed factual background necessary to the resolution of this case. McCann's brief lacks any clear explanation of the incident which led to the disciplinary action taken against her. (*See* Pet. Br. at pp. 3, 5). The actual gravamen of McCann's discipline was abuse of her position and uniform in acting "irrational and

disrespectful" toward the Sheriff of Washington County (which is adjacent to Mobile County) when she showed up at the Washington County Jail in her uniform while trying to secure the release of her son – and not a mere technical violation of a uniform directive. (App. 2a, 27a). The disciplinary process relevant to this case occurred only after Sheriff Wheat of Washington County wrote to the Mobile County Sheriff formally complaining about McCann's behavior. (*Id.*). Beyond this significant omission, McCann chooses to open the factual portion of her brief with the assertion that Sheriff Tillman (the former Sheriff of Mobile County) at some point in time "openly referred to blacks as 'niggers,'" and attempts to imply therefrom that the lower courts should have addressed her argument that "pretext can be shown through language demonstrating discriminatory animus[.]" (Pet. Br. at pp. 1-2, 4, 6-7). In doing so, McCann is merely trying to confuse and inflame the issue, and in fact, clearly misstates the Eleventh Circuit's legal analysis of her disparate treatment claim by importing part of that court's discussion addressing her Title VII failure-to-promote claim. (App. 10a).

ARGUMENT

A. THE "NEARLY IDENTICAL" STANDARD IS NOT AT ISSUE BECAUSE THE LOWER COURTS' DECISIONS TURNED ON FACTUAL DETERMINATIONS THAT FORECLOSE PETITIONER'S CLAIMS EVEN ON LOWER STANDARDS

Petitioner's argument for *certiorari* in this case rests on a fundamentally flawed premise: that the Eleventh Circuit's "nearly identical" standard applicable to similarly-situated comparators in Title VII disparate treatment cases was necessary to the lower courts' disposition of her claim. *Burke-Fowler v. Orange County, Fla.*, 447 F.3d 1319, 1323 (11th Cir. 2006) (describing elements of *prima facie* disparate treatment claims and discussing "nearly identical" standard applicable to third element of same). It is true that McCann would have had to show a "nearly identical" comparator for purposes of this test to prove disparate treatment in the Eleventh Circuit. What the opinions below make crystal clear is that McCann did not even meet substantially more lenient tests for making a *prima facie* case, and in fact, her proffered comparators were "glaringly" different. (*See* App. 31a). In short, this case does not properly present any controversy regarding the "nearly identical" standard as McCann claims it does, and *certiorari* is inappropriate for this reason alone.

In its opinion on McCann's disparate treatment claim, the Eleventh Circuit noted that the comparators identified by McCann were in fact "qualitatively

different" from her in the seriousness of their offenses. (App. 9-10a). The first comparator, one Marnita Coleman, was not disciplined after she got into an altercation with her daughter-in-law. (App. 8-9a). The altercation took place at Coleman's residence. (App. 31a). Coleman was not in uniform. (App. 9a). After some dispute with her daughter-in-law and deputies that were called to the scene, Coleman was arrested and charged with disorderly conduct and conduct unbecoming. (App. 8a). Both the Eleventh Circuit and the district court, "[m]ost notably" found that Coleman had not engaged in any activity or use of her position "in an effort to obtain a personal goal[.]" (App. 9a, 31a). It is particularly in view of these differences which the district court termed "glaring" – the private versus public nature of the underlying incidents, the fact that McCann committed her offense while wearing her uniform, the fact that McCann's behavior was directed against a public official of a neighboring county as opposed to a family member, and most importantly, that McCann was attempting to use her uniform and position in an attempt to derive advantageous treatment from that public official – that McCann's behavior must be viewed. (*See* App. 31a). It is quite clear that McCann's behavior as compared to Coleman's was substantially and glaringly different, and thus fails even to meet a much lower standard than the "nearly identical" standard which McCann attempts to challenge here.

The same conclusion obtains with McCann's other proffered comparator, Jonathan Lindsey.

Lindsey received a written reprimand for being rude to a nurse who was attending to an inmate Lindsey was escorting. (App. 9a). Specifically, Lindsey "used vulgar language and made unprofessional statements" to the nurse, who he believed was being unprofessional in her interactions with the inmate. (App. 31a). Lindsey was in uniform but was on duty and therefore was not in violation of the uniform directive. (App. 9a, 32a). Lindsey directed any inappropriate statements to a civilian, and not a high-ranking public official from another county. (App. 9a, 31a). Perhaps most importantly however, again, Lindsey was not attempting to use his official position and uniform to his personal advantage. (App. 9a, 31a). Although Lindsey obviously committed a breach of etiquette and perhaps an error in professional judgment, his behavior is in no way comparable to the behavior for which McCann was disciplined: he did not abuse his uniform or position for personal gain as McCann undisputedly did.

McCann has offered the Court an extensive petition explaining her counsel's views on the supposed circuit split in regard to the "nearly identical" standard. (*See* Pet. Br. at pp. 10-40). Certainly, many interesting things could be said on the subject – in a case that actually presented the controversy. Unfortunately, McCann never explains precisely how this case actually presents the issue. This is because in light of the Eleventh Circuit's and the district court's opinions on the purely factual aspects of this case, it is abundantly clear that this case does not.

B. PETITIONER HAS MISSTATED THE MATERIAL FACTS APPLICABLE TO HER DISPARATE TREATMENT CLAIM

Beyond the legal inapplicability of the vast bulk of McCann's petition, Respondents must point out that much of her argument relies on two improper strategies. First, McCann fails to completely state the factual background essential to the lower courts' resolution of her claim. Where this tactic fails, McCann engages in a shell game in which irrelevant and unsupported – though certainly inflammatory – assertions are substituted for legal argument.

As to McCann's habit of severely understating the facts relevant to the lower courts' decisions, McCann only vaguely mentions (in discussing the incident which gave rise to the disciplinary action against her) that she "disapproved" of the Washington County Sheriff's practices in arresting her son and that she said this to the Washington County Sheriff along with a sarcastic comment. (*See* Pet. Br. at p. 3). McCann does not bother to describe the incident or precisely why she was disciplined any further. (*Id.*). What McCann fails to mention, and what the lower courts specifically recognized, is that the event that prompted the discipline was the fact that Sheriff Wheat of Washington County wrote a letter to the Mobile County Sheriff's Office complaining about McCann's behavior on the occasion in question, including her irrational and disrespectful behavior toward Sheriff Wheat and his deputies, and her false accusations of misconduct. (App. 2a, 27a). In

other words, this is obviously not a case where the disciplinary process originated internally within the Mobile County Sheriff's Office or even within Mobile County itself: a neighboring public official specifically initiated the investigation and resulting disciplinary process by making a complaint about McCann. It hardly needs mentioning that Sheriff Wheat is not a respondent in this case and this alone, as a purely factual matter, should defeat any claim based on this incident as against the Mobile County Sheriff.

Furthermore, the gravamen of the complaint and discipline levied against McCann was clearly not a mere technical violation of Mobile County Sheriff's Office directives or else vague "conduct unbecoming" accusations. It was clear that she used her uniform and position in an abusive manner and in an attempt to gain a personal advantage. (App. 9a, 31a). McCann is attempting to divert the analysis away from the actual conduct that caused her discipline and into claims that her conduct should be comparable, for purposes of a disparate treatment claim, to anyone who was disciplined for some (though not all) of the same technical violations. Such an approach would mean that almost every disparate treatment claimant under Title VII could find a comparator allegedly guilty of "similar" conduct who was in the end treated differently. Such a result – which would in effect mean that any Title VII plaintiff would be able to make a *prima facie* case regardless of the underlying facts or their comparative severity – would be frankly absurd.

Finally, Respondents must comment on McCann's transparent strategy of using "hot button" and charged terms – specifically in this case, the term "nigger" – straight at the opening of her brief without any real attempt to relate it to her unquestioned burden of satisfying the third prong of the *Burke-Fowler* test applicable in the Eleventh Circuit. Specifically, McCann opens the substantive portion of her brief by stating that this case concerns the "nearly identical" standard applicable in the Eleventh Circuit and then immediately goes on to note that the Sheriff of Mobile County allegedly "openly referred to blacks as 'niggers.'" (Pet. Br. at pp. 1-2, 4). No further attempt to relate this inflammatory assertion to any actual legal argument or standard is made in the petition. In fact, the former Sheriff of Mobile County alleged to have made these comments, Jack Tillman, is never even referred to at any other point. The closest McCann comes to relating this piece of irrelevancy to any legal issue is the assertion that the lower courts refused to consider "racially biased remarks cited by McCann" because she did not "ma[ke] out a prima facie case of racial discrimination[.]" (Pet. Br. at p. 7). If one checks the citation to the portion of the Eleventh Circuit's opinion offered for this proposition, it is obvious that the panel only made this statement with reference to McCann's discriminatory-failure-to-promote claim, an essential element of the *prima facie* showing for which is a showing that other less qualified persons who were not members of the protected class were promoted above the plaintiff. (*See* App. 10a n.6)

(*citing Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1089 (11th Cir. 2004)). The allegedly "less qualified" persons cited by McCann for purposes of her discriminatory-failure-to-promote claim were both black, an obvious and fatal flaw to that particular *prima facie* showing. (*Id.*). Needless to say, that *prima facie* showing is not at issue in this appeal, and is entirely different from the *prima facie* showing McCann failed to make for her disparate treatment claim. In other words, McCann imports a completely unrelated issue solely for the purpose of opening her brief with the charged term "nigger" in the hopes that this Court will thereby not notice the utter lack of a factual basis for her disparate treatment claim.

CONCLUSION

McCann's petition, while being in bulk a learned treatise on the state of the law as regards varying standards applicable to Title VII disparate treatment claims, fails to present any issue related to the "nearly identical" standard applicable in the Eleventh Circuit because McCann cannot make out a *prima facie* case under any standard. Instead, McCann has under or misstated the factual background of her disparate treatment claim, or else attempted to insert inflammatory allegations into her petition as a substitute for any application of the material facts to the law. Her petition is due to be denied by this Honorable Court.

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No. 08-163

Supreme Court, U.S.
FILED
SEP 22 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

GEORGIA MCCANN,

Petitioner,

v.

SAM COCHRAN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

The Eleventh Circuit standard[1] applied in this case has three distinct elements:

> (1) a discrimination plaintiff must show that "her employer treated similarly situated [white] employees more favorably" (Pet. App. 6a; see *id.* at 7a n.4, 8a,),
>
> (2) the courts are to determine whether or not the more favorably treated comparator was "similarly situated" (Pet. App 6a),[2] and
>
> (3) a court may find that a plaintiff and a comparator are "similarly situated" only if

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[1] Since the filing of the certiorari petition, the Eleventh Circuit has applied its "nearly identical" standard in four additional cases; as with every previous application of that standard, the Eleventh Circuit held that the standard had not been satisfied. *Curtis v. Broward County*, 2008 WL 16551 at *2 (11th Cir., Sept. 16, 2008) (Title VII); *Greer v. Birmingham Beverage Co., Inc.*, 2008 WL 4061161 at *3 (11th Cir., Sept. 3, 2008) (Title VII); *Davis ex rel. J.D. v. Houston, AL Bd. of Educ.*, 2008 WL 3919400 at *1 (11th Cir., August 27, 2008) (Equal Protection claim); *Brillinger v. City of Lake Worth*, 2008 WL 3864384 at *4 (11th Cir., August 21, 2008) (ADEA).

[2] In order to *determine* whether other employees were similarly situated to McCann, *we evaluate* " 'whether the employees are involved in or accused of the same or similar conduct.... ' "

(emphasis added) (quoting *Burke-Fowler v. Orange County, Fla.*, 447 F.3d 1319, 1323 (11th Cir. 2006)).

> the circumstances of the two individuals are "nearly identical." (Pet. App. 6a, 7a n.4, 9a).

Respondents do not deny that there is a deeply entrenched inter-circuit conflict with regard to all of these elements of the Eleventh Circuit standard. They argue only that the instant case does not present an appropriate vehicle for resolving the Question Presented.

(1) In dismissing plaintiff's claim, the Eleventh Circuit expressly applied its requirement that any comparator be "nearly identical" to McCann.

> The comparators that McCann presents on appeal must ... satisfy the "nearly identical" test. (Pet. App. 7a n.4).
>
> While we recognize the difficulty McCann may face in meeting this standard, we are bound by precedent to adhere to the "nearly identical standard." (Pet. App. 7a n.4) (*quoting Burke-Fowler v. Orange County, Fla.* 447 F.3d 1319, 1323 (11th Cir. 2006)).
>
> As the district court correctly found, [proposed comparator] Coleman's misconduct is not "nearly identical" to McCann's, making Coleman an improper comparator. (Pet. App. 9a).
>
> As with Coleman, because [proposed comparator] Lindsey's misconduct is not "nearly identical" to that of McCann, it cannot be used as a comparator. (Pet. App. 9a).

The court of appeals opinion refers to the "nearly identical" standard nine times (Pet. App. 6a-9a), and pointedly includes an explanation of why the appellate court applied the "nearly identical" standard rather than some less stringent rule. (Pet. App. 7a n.4).

Respondents nonetheless contend that this case is not an appropriate vehicle for determining the correctness of that standard, arguing that they would prevail on remand even if this Court rejects the Eleventh Circuit requirement that comparators be nearly identical to a plaintiff. This argument is unavailing for several reasons.

The possibility that a respondent might ultimately prevail on remand even under a different standard does not preclude a grant of certiorari. It would ordinarily make little sense for the Court, in evaluating a petition for certiorari, to undertake the fact-bound effort required to assess which party might succeed under each of the possible legal standards the Court could adopt if it reached the merits. This Court has frequently granted review to determine the legal standard applicable to a particular set of circumstances, and then remanded the case to the lower courts to apply (if they failed to do so before) the proper standard.[3] In employment discrimination

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[3] E.g., *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 128 S.Ct. 2123, 2131 (2008); *Phillip Morris USA v. Williams*, 127 S.Ct. 1057, 1065 (2007); *Merck KGaA v. Integra*

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cases the Court has repeatedly granted certiorari to correct an error in the legal standard utilized by the court of appeals, without deciding or even inquiring whether the petitioner would be entitled to prevail under the correct standard.[4]

Respondents' argument necessarily assumes, moreover, that this Court, upon granting review, will rule in their favor on the two other subsidiary issues raised by the petition, holding (as did the Eleventh Circuit) that any prima facie case must include evidence of a more favorably treated similarly situated comparator, and that there must be a judicial finding that any comparator is similarly situated. But were this Court instead to hold – as we urge – that a prima facie case need not include evidence of a similarly situated comparator, or that the trier of fact – not the courts – is to weigh such evidence, either such holding would require that the decision below be set aside, regardless of whether the lower courts believe that the plaintiff and the comparators in this case were similarly situated. The remand in which

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Lifesciences I, Ltd., 545 U.S. 193, 207 (2007); *Rapano v. United States*, 547 U.S. 715, 757 (2006).

[4] E.g., *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524 (1993); *Furnco Constr. Corp. v. Waters*, 483 U.S. 567, 581 (1978); *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 717 (1983); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259-60 (1981); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978); *McDonnell Douglas v. Green*, 411 U.S. 792, 806-07 (1973).

respondents assert they would prevail – for the lower courts to apply some other legal standard to the comparator evidence in order to decide if plaintiff established a prima facie case through proof of a similarly situated comparator – simply would not occur.

Respondents argue that "McCann's comparators were not 'similarly situated' to her under *any* standard." (Br. Opp. 4) (emphasis added). But it assuredly is not the case that respondents are certain to prevail "under any standard." All standards other than the "nearly identical" requirement deem comparators proper despite some non-trivial differences between the circumstances of the comparator and those of the plaintiff. It would clearly be possible to frame a standard under which the differences in this case (or, indeed, in any particular case) would not render the comparators improper.

Petitioner would succeed in establishing a prima facie case, for example, under the two-tier approach utilized in the Eighth, Ninth and Tenth Circuits. (Pet. 25-28). Those circuits do not consider at the prima facie case stage a defendant's proffered explanation for having treated the plaintiff differently than the comparators. In those three circuits the distinctions which respondents insist are so persuasive would not be considered in determining whether there was a prima facie case, but only in deciding whether the differing treatment of the comparators was sufficient (with any other relevant evidence) to support a finding of discrimination.

Petitioner would likely prevail as well under the "comparable seriousness" standard utilized in the Second, Fourth, Sixth and Seventh Circuits. (Pet. 20-23). In those circuits a comparator is appropriate if his or her conduct was comparable to or worse than the action for which the plaintiff received a harsher form of discipline.[5] In the instant case, one of the

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[5] Respondents assert that

> both the district court and the Eleventh Circuit dismissed McCann's claims because the comparators she identified were in fact "qualitatively different" and because McCann's conduct was "plainly ... more serious than that of her comparators." (App. 9-10a, 33a).

(Br. Opp. 4). The Eleventh Circuit's decision in fact contains no such statement that McCann's conduct was "more serious"; only the district court characterized the record in that manner.

Similarly respondents assert that

> the Eleventh Circuit noted that the comparators identified by McCann were in fact "qualitatively different" from her in the seriousness of their offenses.

(Br. Opp. 6-7). The phrase "in the seriousness of their offenses" does not appear in the Eleventh Circuit opinion.

Under the "nearly identical" rule a comparator is improper if his or her conduct is "qualitatively different" from that of the plaintiff, regardless of which is more serious. In common usage "qualitatively different" does not necessarily connote a difference in gravity of the conduct. The Sentencing Guidelines, for example, treat as equally serious (and assign the same base level to) crimes that obviously are qualitatively different. The offenses given the base level of 18 include crimes as varied as criminal sexual assault of a minor, stalking, embezzlement of between $100,000 and $200,000, extortion by force, trafficking in between 20 and 40 grams of heroin, obstruction of an election by force, and price fixing involving a volume of commerce between

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white comparators (who was not punished at all) had been arrested, prosecuted for and pled guilty to two misdemeanors. (Pet. App. 8a-9a, 30a-31a). The courts have recognized that criminal conduct is generally more serious than non-criminal conduct. Another proffered white comparator, who like petitioner was charged with conduct unbecoming an officer, had engaged in that action while on duty; that comparator (unlike plaintiff) was not suspended. (Pet. App. 9a-10a, 31a-32a). The Eleventh Circuit itself has held that on-the-job misconduct is more serious than actions, such as those of petitioner, which occurred when she was off duty.[6]

(2) Respondents do not question the appropriateness of this case as a vehicle for deciding if judges rather than juries should evaluate whether a more favorably treated comparator is sufficiently similar to a plaintiff. Far from denying that the decision below turned on this issue, respondents emphatically recognize and enthusiastically endorse the Eleventh Circuit rule that it is for judges to decide whether a comparator is similarly situated.

Respondents argue that petitioner failed to establish a prima facie case because "the lower courts'

$40 and $100 million. U.S. Sentencing Guidelines Manual, §§ 2A3.2, 2A6.2, 2B1.1, 2B3.2, 2D1.1, 2H2.1, 2R1.1 (2007).

[6] *Maniccia v. Brown*, 171 F.3d 1364, 1369 (11th Cir. 1999) (male comparator not a proper comparator because, unlike the plaintiff, "[h]is [misconduct] w[as] off-duty conduct, with which most employers understandably are not as concerned.").

decisions *found* the comparators' behavior too significantly and qualitatively different." (Br. Opp. i) (emphasis added). "[T]he lower courts' decisions turned on *factual determinations* that foreclose petitioner's claims even on lower standards." (Br. Opp. 6.) (emphasis added). But *whether* the lower courts should have made any such "f[i]nd[ings]" and "factual determinations," or should instead have referred the assessment of this evidence to the trier of fact, is part of the very issue in dispute. Six circuits do not permit the courts to make such findings, but insist that this issue be resolved by the jury. (Pet. 33-35). The Question Presented specifically encompasses the issue of whether the similarity of a plaintiff and a comparator – an issue which respondents rightly characterize as "factual" in nature – should be resolved by "judicial finding" rather than by the trier of fact. (Pet. i).

(3) Respondents also do not question the appropriateness of this case as a vehicle for resolving whether, as the Eleventh Circuit held, a prima facie case of discrimination must invariably include evidence that the employer treated more favorably a similarly situated comparator. Respondents acknowledge that that Eleventh Circuit requirement was the very basis of the decision below. "McCann's claims were dismissed because her comparators were not 'similarly situated' to her." (Br. Opp. 4). In six circuits the absence of a similarly situated comparator does not – as in the Eleventh Circuit – require dismissal of a claim. (Pet. 14-19).

This is an excellent case for deciding whether a plaintiff can establish a prima facie case of discrimination without evidence of such a similarly situated comparator. Even if the proffered comparators in the instant case were not sufficiently similar to the plaintiff, the plaintiff had other highly significant evidence, including testimony that the Sheriff who made the decision to discipline the plaintiff had earlier referred to African-Americans as "niggers." (Pet. App. 19a, 70a). A reasonable jury could surely infer that a public official who refers to African-Americans as "niggers" harbors racial animus and that that bigotry could have been a motivating factor in his decision to discipline a black subordinate. The courts below deemed that highly inculpatory evidence irrelevant solely because, under the Eleventh Circuit rule, even proof of racial prejudice may not even be considered in the absence of an appropriate comparator.

(4) Respondents describe in considerable detail the exculpatory evidence[7] on which they intend to rely

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[7] Much of the evidence relied on by respondents was controverted. For example, respondents argue that

> the event that prompted the discipline was the fact that Sheriff Wheat of Washington County wrote a letter to the Mobile County Sheriff's Office complaining about McCann's behavior.

(Br. Opp. 9). That letter, however, was written by Sheriff Wheat at express the request of the Mobile County Sheriff's Office. Transcript of Mobile County Personnel Board Hearing at 169

(Continued on following page)

if the courts were to hold that plaintiff had established a prima facie case, and the case were therefore to proceed to trial. (Br. Opp. 2-5, 9-12). That evidence, however, is of no relevance to the correctness of the legal standard applied by the Eleventh Circuit in concluding that plaintiff had failed to establish a prima facie case.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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(testimony of Michael Haley) ("the letter that Sheriff Wheat wrote in response to [Haley's] request.").